Supreme Court, U. S.
FILED
MAR 10 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-453

BARRY VAN LARE, individually and in his capacity as Acting Commissioner of the Department of Social Services of the State of New York, ABE LAVINE, individually and in his capacity as Commissioner of the Department of Social Services of the State of New York, LOUIS P. KURTIS, individually and in his capacity as Commissioner of the Department of Social Services of the County of Westchester,

Appellants,

against

ROSE HURLEY, individually and on behalf of her minor children, DOREEN HURLEY, JAMIE HURLEY and JOHN HURLEY and on behalf of all other persons similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURTS FOR THE SOUTHERN AND EASTERN DISTRICTS OF NEW YORK

No. 74-5054

ANNIE TAYLOR, individually and on behalf of her minor, dependent child, MARGARET TAYLOR, CHARLOTTE OTEY, individually and on behalf of her minor, dependent child, KEVIN OTEY, ROSE HURLEY individually and on behalf of her minor children, DOREEN HURLEY, JAMIE HURLEY and JOHN HURLEY, and on behalf of all other persons similarly situated,

Petitioners,

(continued)

against

ABE LAVINE, individually and in his capacity as Commissioner of the Department of Social Services of the State of New York, JAMES M. SHUART, individually and in his capacity as Commissioner of the Nassau County Department of Social Services, BARRY VAN LARE, individually and in his capacity as Acting Commissioner of the Department of Social Services of the State of New York, and LOUIS P. KURTIS, individually and in his capacity as Commissioner of the Department of Social Services of the County of Westchester,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR APPELLEES IN NO. 74-453 AND FOR PETITIONERS IN NO. 74-5054

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BRIEF FOR APPELLEES IN NO. 74-453 AND FOR PETITIONERS IN NO. 74-5054

OPINIONS BELOW

The opinion of the single district judge in *Hurley v. Van Lare* is reported at 365 F.Supp. 186 (S.D.N.Y. 1973). (A.74).[1] The opinion of the single district judge in *Taylor v. Lavine*, which adopted the decision of the single district judge in *Hurley v. Van Lare*, is unreported and appears in the Appendix at A.140.

The *Hurley* and *Taylor* actions were consolidated before the United States Court of Appeals for the Second Circuit. The majority and dissenting opinions of the Court of Appeals are reported *sub nom. Taylor v. Lavine* at 497 F.2d 1208 (2d Cir. 1974). (A.157).

Upon remand from the Court of Appeals, the *Hurley*

[1]References to the Appendix are denominated "A."

and *Taylor* actions were consolidated and a hearing was held before a three-judge district court. The majority and dissenting opinions of the three-judge court are reported *sub nom. Hurley v. Van Lare* at 380 F.Supp. 167 (S. and E.D.N.Y. 1974). (A.639).

JURISDICTION

The judgment of the Court of Appeals was entered on May 14, 1974. (A.157). A timely petition for rehearing *en banc* was denied by the Court of Appeals on June 18, 1974, with two Judges dissenting. (A.185-186). The Petition for a Writ of Certiorari was filed on August 2, 1974 and was granted by this Court on December 9, 1974. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

The judgment of the three-judge district court was entered on August 15, 1974. (A.661-663). The Notice of Appeal was filed in the district court on August 20, 1974. (A.664-665). The Jurisdictional Statement was filed on October 18, 1974, and this Court noted probable jurisdiction on December 9, 1974. The jurisdiction of this Court rests on 28 U.S.C. §1253.

STATUTES AND REGULATIONS INVOLVED

The relevant statutory and regulatory provisions are set forth as exhibits to the Brief for Appellants–Respondents.

QUESTIONS PRESENTED

1. Whether New York's "lodger" regulations, which cause a pro-rata reduction in the shelter allowance of a family receiving Aid to Needy Families With Dependent Children assistance solely because a parent allows a non-legally responsible person to reside in the home, violate the Social Security Act and implementing regulations of the Department of Health, Education and Welfare.

2. Whether New York's "lodger" regulations, which cause a pro-rata reduction in the shelter allowance of a family receiving public assistance solely because a parent allows a non-legally responsible person to reside in the home, constitute a conclusive presumption of decreased shelter need in violation of the Due Process Clause of the Fourteenth Amendment.

3. Whether New York's "lodger" regulations, which cause a pro-rata reduction in the shelter allowance of a family receiving public aysistance solely because a parent allows a non-legally responsible person to reside in the home infringe upon the rights of privacy and association in the home, and violate the Equal Protection Clause of the Fourteenth Amendment.

4. Whether the three-judge court properly excluded evidence of alleged gifts made to a recipient by a "lodger" prior to the time the recipient family's grant was reduced, where the issue of contribution was resolved in prior proceedings between the parties and where gifts by a "lodger" have no legal significance under the challenged regulations.

5. Whether the claims of two of the named plaintiffs became moot when their full grants of public assistance were restored where the "lodger" regulations have a

continuing impact on the relationship between the public assistance family and the "lodger" and where the challenged regulations have compelled one plaintiff to ask the non-legally responsible person to leave the household.

6. Whether the three-judge court properly defined the scope of the class.

STATEMENT

Each of the named plaintiffs-appellees-petitioners (hereafter plaintiffs) is a recipient of Aid to Needy Families with Dependent Children assistance (hereafter AFDC) on behalf of herself and her minor children. 42 U.S.C. §601 et seq. Each plaintiff, and the other recipients of public assistance in the plaintiff class, has received a reduced grant of public assistance pursuant to the challenged regulations or has been threatened with such a reduction solely because the caretaker relative has allowed a person who has no legal obligation to support the public assistance family, and who is not a recipient of public assistance, to reside in the public assistance household. 18 N.Y.C.R.R. §§352.30(d); 352.31(a)(3)(iv).

Plaintiffs' public assistance grants have been reduced despite the fact that the person residing in the home has no legal obligation to support the public assistance family, has made no financial contribution or paid any part of the rent, and may even be unable to make such a contribution or payment. Plaintiffs' grants have been reduced without a determination by defendants-appellants-respondents (hereafter defendants) that plaintiffs' shelter needs have been reduced by this person's

presence in the home. The reduction consists of a pro-rata reduction in the public assistance family's shelter allowance.

Plaintiffs contend that the challenged regulations violate the Social Security Act, 42 U.S.C. §601 et seq., implementing regulations of the United States Department of Health, Education and Welfare (hereafter HEW), the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the rights of privacy and association.

Plaintiff Rose Hurley.

Plaintiff Rose Hurley and her three minor children are recipients of AFDC assistance. (A.32,36). She has been living separately from her husband since 1967 and does not know his whereabouts. (A.32).

In 1970 and until July, 1971, Mrs. Hurley and her three children resided in a two bedroom apartment in Mount Vernon, New York. (A.233). The family's rent for this apartment was $150 per month, which is less than the maximum shelter allowance permitted by the Westchester County Department of Social Services for a family of 4 persons (5 rooms). (A.33, 36, 599). The Hurley family did not have more space than necessary for Mrs. Hurley and her children. (A.233-234).

In November and December, 1970 and January and February, 1971, a male friend resided with the Hurley family. (A.33, 36). This friend made no financial contribution to the Hurley family and was under no legal obligation to provide financial support to Mrs. Hurley or her children. (A.33, 36-37). This friend was

not himself a recipient of public assistance.[2] The family's monthly rental obligation was not increased as a result of his presence. (A.33).

During November and December, 1970 and January and February, 1971, the Westchester County Department of Social Services ("local agency") reduced the family's public assistance grant because of the presence of Mrs. Hurley's friend in the home. (A.33, 36). During this four month period the Hurley family used part of their grant for food and clothing to meet their rental obligation. (A.33).

A State "fair hearing" was held on March 22, 1971 pursuant to 18 N.Y.C.R.R. Part 358 to review the determination of the local agency. (A.33, 36). On September 20, 1971, the Acting State Commissioner of the New York State Department of Social Services, defendant Van Lare, upheld the determination of the local agency reducing the Hurley family's grant pursuant to the challenged regulations because of the presence of her friend in the home, except that he held that the reduction should have been $30 per month instead of $35 pursuant to 18 N.Y.C.R.R. §352.31(3)(iv) and 352.30(d). (A.36-37).

Defendant Van Lare's "Decision After Fair Hearing," after finding the facts set forth above, concluded:

> "The record establishes that the man residing with appellant was not willing to assume responsibility for the appellant or her children and there are no children of which he is the acknowledged or adjuciated father. In addition, no contribution is

[2]There is nothing in the record that indicates whether or not this person was employed.

category. (A.228). As of January 1, 1974, she was transferred to the Supplemental Security Income (S.S.I) program. (A.228).[4]

Plaintiff Charlotte Otey.

Plaintiff Charlotte Otey and her minor son Kevin are recipients of AFDC assistance. (A.109,228). They reside in a 2 bedroom apartment in Freeport, New York, for which plaintiff pays $145 per month rent. (A.228-229). Prior to October, 1972, plaintiff received a shelter allowance of $145 from the local agency, the maximum shelter allowance for a family of 2 residing in Nassau County. (A.228-229,551).

On October 1, 1972, plaintiff's adult son, Michael Otey, then 24, came to reside with his mother and younger brother. (A.229). While he resided with plaintiff, Michael Otey was unemployed except for occasional temporary jobs. (A.229). He is not obligated to support his mother and younger brother and in fact made no financial contribution to them and paid no part of the rent. (A.229). Michael had also resided with the family on several occasions prior to October, 1972 and after he had reached age 18. (A.229).[5]

[4]By a 1972 amendment to the Social Security Act, a recipient of S.S.I. assistance who resides with an AFDC family "shall not be regarded as a member of the [AFDC] family for purposes of determining the amount of the benefits of the [AFDC] family...." 42 U.S.C. §602(a)(24). HEW has construed this provision to mean that "the need ... and the amount of assistance payment should be determined as though the SSI beneficiary were not in the home." HEW Program Instruction APA-PI-74-8, December 20, 1973.

[5]Age 18 is the cut off point for A.F.D.C. assistance for a minor not attending school full time. 42 U.S.C. §606(a).

On October 26, 1972, plaintiff was advised by the local agency that the family's shelter allowance would be reduced for the following reason: "You must share shelter with your son, Michael Otey. Your share of shelter is 96.65 [2/3 x $145]." (A.114).

Plaintiff Otey requested a State "fair hearing" to review the reduction in her shelter allowance. (A.229). She failed to appear for the hearing because her older son Michael had advised her that he would either find a job and contribute to the household or leave the State and stay with relatives in West Virginia. (A.229).

As a result of the reduction in the family's shelter allowance, rent arrears of $48.34 accrued each month and the family was threatened with eviction. (A.137-138,229). The local agency subsequently made a direct grant of the rent arrears to the landlord to forestall the family's eviction, and attempted to "restrict" plaintiff's shelter allowance, i.e., to mail the reduced rental allowance directly to the landlord.[6] (A.126,229). This restriction was nullified in a "Decision After Fair Hearing" in which defendant Lavine found that the restriction was improper because there was no evidence of mismanagement, "especially since the evidence establishes that appellant used all of her shelter allowance and a few dollars more to make the partial rent payment she made." (A.127,230).

In February, 1974, Michael Otey left his mother and brother to reside independently. (A.230). Since he left, plaintiff Otey has been receiving a full shelter allowance. (A.230).

[6]See 18 N.Y.C.R.R. §381.3(a).

Other Members of the Class.[7]

Phyllis D'Alessio.

Phyllis D'Alessio and her two minor children are recipients of AFDC assistance. (A.44,269-270). They receive a monthly grant of $354 which includes a shelter allowance of $175 to meet their actual rent of $175, including heat. (A.270,272). This rent is less than the maximum allowed for a family of 3 persons residing in Westchester County. (A.599). They live in a 2 bedroom apartment in Mount Vernon, New York which was characterized by an expert witness as "far below a modern standard for . . . a family of that size." (A.271-272,305-306,327). She has sought to obtain a divorce, but the Legal Aid Society was unable to commence a divorce proceeding because she could not afford the necessary disbursements. (A.45,48-52,269).[8]

Over the past six years Mrs. D'Alession has been hospitalized several times for surgical and other treatment. (A.270). Because of her illness and periods of convalescence, plaintiff has not been able to carry out most of the family and household functions. (A.45,270).

A male friend resides with the D'Alessio family. (A.269). He resides in one bedroom with Mrs. D'Allesio. (A.271-272). The children sleep on bunk beds in the second bedroom, which is not large enough for adjoining beds. (A.272). The fact that the male

[7]The facts of the members of the class set forth below are those of proposed plaintiff-intervenors.

[8]This was prior to this Court's decision in Boddie v. Connecticut, 401 U.S. 371 (1971).

friend resides with the D'Alessio family does not mean that the family has more space than necessary for Mrs. D'Alessio and her children. (A.272). "During Mrs. D'Alessio's periods of illness and convalescence, he took care of her and her children, shopped for food, washed the family's clothes, cooked the family's meals, cleaned the house and performed other household tasks. He, himself, has various disabilities including extreme high blood pressure and he is presently unable to work. He is under no legal obligation to support the family and, in fact, has provided no financial support." (A.269-271, 277,643). He pays no part of the family's rental expense. (A.271,277). The children regard him as their father. (A.270).[9]

This male friend is not a recipient of public assistance and has not applied for assistance because "he wants nothing to do with public assistance." (A.271,287). The family's rental expense was not increased because of his presence in the home. (A.271).

On or about January 22, 1973, Mrs. D'Alessio received a letter from the local agency stating that her public assistance grant would be reduced from $336.00 to $292.40. (A.274,488-489). The letter stated: "Quality control reports of 1/15/72 indicate that Mr. Mattrola [sic] resides with you and your family. Therefore we are pro-rating your rent 3/4 of 175 =

[9]This male friend is not an "essential person" under 42 U.S.C. §602(a)(7), since an essential person must be designated as such by the recipient, and the recipient has not in this case done so. Solman v. Shapiro, 300 F.Supp. 409, 415 (D. Conn.) (three-judge court), *aff'd per curiam*, 396 U.S. 5 (1969); 45 C.F.R. §233.20(a)(2)(vi)(b) (1973).

131.40." (A.488-490).[10] A reduction in Mrs. D'Alessio's shelter allowance of $43.60 per month would leave insufficient funds for food and other necessaries for her children and her herself. (A.275-276, 281-282,306-307, 328-329).

She explained why she would not request that her male friend contribute to the family's rental expense:

> "This man has just come out of the Veterans Hospital after three weeks of hospitalization, and he is not fit for work right now due to extreme high blood pressure, hypertension. And his only way of work is a golf course, and he is not going to go out on the golf course and have a stroke, so that he can pay $43 a month rent." (A.286).

Loretta Clark.

Loretta Clark and her five minor children are recipients of AFDC assistance. (A.58). They reside in Buffalo, New York. Mrs. Clark is divorced. (A.58). A male friend, who has no legal obligation to support the Clark family and who in fact has not provided any support, resides with the Clark family. (A.59). He helps with the family housework, in preparing the meals and in caring for the children. (A.59). Mrs. Clark's monthly rent is $75. (A.64).

Pursuant to the challenged regulations, defendant Lavine, in his "Decision After Fair Hearing" dated February 14, 1973, upheld a reduction in the Clark

[10]Defendants have agreed to provide Mrs. D'Alessio and her children with a full grant of assistance pending the outcome of this litigation. (A.87-88, 275).

family's shelter allowance, reducing the family's semi-monthly grant from $204 to $137. (A.63-65). The decision stated:

> "As there was no evidence presented to establish that the unrelated person in appellant's household was contributing at least $15.00 per month, the agency correctly determined to pro-rate the family's shelter allowance including fuel for heating. . . ." (A.65).

The Clark family has continued to receive a reduced shelter allowance because of the presence of Mrs. Clark's male friend in the home. (A.239). This has required Mrs. Clark to use part of the basic grant for food and clothing to meet the family's rental obligation. (A.239).

Francesca Aloise.

Francesca Aloise and her minor son are recipients of AFDC assistance. Because her adult son, who is not eligible for public assistance, resides with them, defendants have reduced the family's shelter allowance by 1/3 or by approximately $53 per month, pursuant to the challenged regulations. (A.211-214).

The Expert Testimony:

Dr. Herbert Gans, a sociologist and urban planner (A.296-297, 496-521), explained why it is prevalent among the poor for non-legally responsible relatives or friends to reside with the family:

> "[P]oor people double up because they don't have any other alternative." (A.310).

. . .

"Poor people often live a very insecure existence. . . . So, quite frequently you do get a pattern among poor people, if they can't work or they can't find work either temporarily or premanently, of moving in with a relative, either temporarily or permanently, because there simply isn't any money to establish or to continue to maintain one's own household. And typically, then, the people then become lodgers, help out in the family in various ways in lieu of paying rent, helping to raise the children, taking care of the house, doing a variety of things. (A.298)[11]

. . .

"[W]here there is poverty and insecurity people get very dependent on each other to tide them over during crises, so that you have, and this has been found in studies all over the world among poor people . . . a very generous extension of help and hospitality to others, relatives and close friends.

"And this exists not because poor people are necessarily more altruistic or more generous than other people, but because this is really the only way you can survive in a crisis. If you don't have somebody who you can rely on to bail you out with a couple of dollars to get you to the hospital, if one of your kids suddenly gets sick, to provide you a room if your landlord evicts you or if your building burns down or becomes uninhabitable, if this ability to call on somebody for help is not available, then survival for the poor is much more risky. And so what happens is you get a pattern of mutual help, of mutual obligation, people helping each other because they know if they help somebody when they have a problem, they will be helped in return." (A.302-303).

[11]See also, A.240-241, 299-300.

. . .

"One part of this helping phenomenon is people making room in their house for somebody who is in need of shelter temporarily or permanently, and again only in this case on the grounds that if I don't do it for him or her now, he won't do it for me when I am faced with that problem." (A.303).[12]

While welfare recipients are already residing in "inadequate space", (A.305) he explained why welfare recipients often choose to share their inadequate housing with others:

"[E]specially [in] the New York area, they get small rooms, if they are [on] Welfare . . . so they live in a minimum space to begin with.

"When somebody else comes in they become more crowded, obviously. But the exchange—they make this sacrifice because again this is a perfect example of obligation of mutual help that I discussed earlier. You make a sacrifice because then you obligate the other person to help you when you are in need." (A.312-313).

Dr. Gans stated that this "doubling up phenomenon among poor people . . . is particularly [prevalent] . . . where the head of the household is a woman." (A.301). A "lodger" who resides with the family very often "feel[s] that [his] poverty is temporary . . . and [doesn't] want to get involved with being on welfare—welfare itself is a full-time job quite often. . . . Other people . . . just have the pride of independence . . . and say they want to make it on their own however that is going to be." (A.298-299).

[12]Accord, C. Stack, *All Our Kin: Strategies for Survival In A Black Community*, pp. 28-31, 40-41, 43, 45, 107, 123-125, 129 (1974); A. 474-475.

The enforcement of the challenged regulations often forces the male friend out of the house:

> ". . . I am talking generally [about] what happens in the poor community.
>
> "Quite often the relationship between men and women is a very fragile one, particularly when the men are . . . economically marginal in society and told that they are not useful economically, (a) the men don't have much money, (b) their egos are very sensitive and they might just say well, if you ask me to pay I will just move out on you and that would be the end of—in essence, the relationship would be sacrificed to whatever the rental money was.
>
> "[I]f the lodger is a man who is living with a woman, he becomes a lodger to serve a variety of functions in the family, helping raise the children, taking care of the house. I think the relationships are such that if the woman asked him for money, in most cases he doesn't have it, even if he had it he might say well, if you put it on that basis, I will just move out and then the woman is deprived of the relationship with the man which is part of life and of the fatherly functions that this kind of lodger often performs." (A.314).[13]

Paul Davidoff.

Paul Davidoff, an urban planner, (A.316-319), testified about the severe shortage of adequate housing in New York State, and the low vacancy rates.

[13]See, C. Stack, *All Our Kin: Strategies for Survival In A Black Community*, 112 (1974); Note, AFDC Income Attribution: The Man-in-the House and Welfare Grant Reductions, 83 Harv. L. Rev. 1370, 1373, 1374, 1383 (1970).

(A.321-324,411,417).[14] He referred to studies which substantiate "that welfare families live disproportionately in the worst housing [,] in the most overcrowded housing [and,] in housing that is of exceptionally high rent relative to income abilities." (A.246-248,324,367,369-374,412-413,456, 471-472,474-476). One of these studies establishes that *"there is no question of the concentration of the welfare tenantry in [New York] City's oldest and poorest categories of housing."* (A.369) (emphasis in original). Because "many welfare recipients are overcrowded", (A.372,471), Mr. Davidoff testified that it is highly unlikely that families in the plaintiff class have excess space. (A.339).

New York's Public Assistance Shelter Policies:

In New York, a public assistance family's rental allowance is computed as an item of need separate from the basic standard of need for the other necessities including food and clothing. *N.Y. Social Services Law*, §131-a.[15] Rent allowances are provided pursuant to 18 N.Y.C.R.R. §352.3. Pursuant to this section, each local

[14]There is an "almost zero vacancy rate for low-rental housing in large parts of New York State. . . ." (A.649).

[15]The standard of need which is the basis for the computation of the "basic grant" and which covers items of necessity other than shelter is as follows:

Number of Persons in Household

One	Two	Three	Four	Five	Six
$94	$150	$200	$258	$318	$368

"For each additional eligible person in the household there is added an additional allowance of fifty dollars monthly." *N.Y. Social Services Law* ,§131-a(2)(3).

social services district in New York has established a schedule of maximum shelter allowances based on the number of persons in the household who are eligible for public assistance. (A.526-603).[16] Section 352.3(a) provides that the maximum shelter "allowance schedule shall provide a sufficient amount for all persons to obtain housing in accordance with standards of public health in the community." 18 N.Y.C.R.R. §352.3(a). The rental allowance provided pursuant to section 352.3(a) is thus designed to meet the public assistance family's actual rental obligation and reflects the actual shelter needs of the AFDC family. *Boddie v. Wyman*, 434 F.2d 1207, 1209 (2d Cir. 1970), *aff'd*, 402 U.S. 991 (1971). ("Shelter costs [are] paid as needed.")[17]

The challenged regulations cause a pro-rata reduction of the family's shelter allowances provided pursuant to section 352.3 solely because a caretaker relative in a family receiving public assistance allows a person, who has no legal obligation to support the public assistance

[16]Contrary to defendants' statements, Brief of Appellants-Respondents, pp. 8, 38 fn, the regulations do not contemplate separate shelter grants for each recipient in the home but one shelter allowance to meet the shelter needs of the entire public assistance family.

[17]The average monthly shelter allowance provided by New York ranges from $80 for a single person to $129 for a household of seven or more persons. (A.614). The average shelter allowance for a four person household is $113. (A.614). While defendants claim that the shelter allowances provided pursuant to section 352.3 meet the full shelter expenses for 93% of the recipients (A.343), it should be noted (1) that the study pursuant to which this figure was obtained gave no consideration to the adequacy of housing (A.344) and (2) that the State has promulgated proposed schedules, 18 N.Y.C.R.R. §352.3(a) (A.523-525) that would substantially increase the shelter allowances provided to recipients. (A.526-603).

family, and who is not a recipient of public assistance, to reside with them. 18 N.Y.C.R.R. §§352.30(d); 352.31(a)(3)(iv). The regulations term this non-legally responsible person a "lodger." The facts reveal, however, that this so-called "lodger" may in fact be a disabled friend, an adult unemployed son, or an incapacitated sister.

Plaintiffs emphasize that they are not seeking an additional shelter grant for the "lodger." Plaintiffs only seek to maintain their shelter allowances at an amount allowed for the number of *eligible* persons in the home, and to prevent reductions from this amount pursuant to the challenged regulations.

Under the "lodger" regulations, the public assistance family's shelter allowance is reduced without any determination by defendants as to whether the non-legally responsible person has made a financial contribution to the family or has paid any part of the rent expense, or is even able to make such a contribution or payment, and even though the non-legally responsible person's presence in the house does not increase the rental expense to the public assistance family or to the State. (A.36-37, 63-65, 120-121, 211-214). When this non-legally responsible person leaves the family's home, the full shelter allowance is restored. (A.230).

The challenged regulations come into operation irrespective of the adequacy of the public assistance family's space. (A.348). Defendants' expert witness, a Senior Program Specialist for the New York State Department of Social Services (A.257), testified that "you have a set amount of space that you and your family are living in. If someone else comes to live with

you, this is not to say that before you had too much space." (A.348). If the recipient family moves into a smaller apartment, and the "lodger" resides with them, the shelter allowance will again be reduced pro-rata no matter how small the apartment is and no matter how low the family's rental expense is. (A.333-334).

Proceedings Below:

Plaintiff Hurley commenced a class action pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1343(3) in the United States District Court for the Southern District of New York on August 11, 1972. (A.1). Plaintiffs Taylor and Otey commenced a similar class action in the District Court for the Eastern District of New York on May 17, 1973. (A.7).

By decision dated October 3, 1973, the District Court in the *Hurley* action held: (1) that the court had subject matter jurisdiction over the constitutional claims presented and would exercise pendent jurisdiction over the Social Security Act claim; (2) that the action was a proper class action; and (3) that the challenged State regulations were invalid because they conflicted with the Social Security Act and its implementing regulations, particularly 45 C.F.R. §233.90, as construed by this Court's decisions in *King v. Smith*, 392 U.S. 309 (1968) and *Lewis v. Martin*, 397 U.S. 552 (1970), in that they impermissibly conclusively assume that the non-legally responsible person is contributing towards

the family's shelter expense. *Hurley v. Van Lare*, 365 F.Supp. 186 (S.D.N.Y. 1973). (A.74).[18]

By decision dated October 10, 1973, the District Court in the *Taylor* action found the decision in the *Hurley* action "convincing" and "adopted" its "reasoning on class action status, jurisdiction, inconsistency of the state regulation and injunctive relief. . . ." (A.140,142).

Defendant Lavine appealed from the judgments of the District Courts to the United States Court of Appeals for the Second Circuit. The actions were consolidated on appeal *sub nom. Taylor v. Lavine*. On May 14, 1974, the Court of Appeals, by a two to one vote, reversed the judgments of the District Courts. *Taylor v. Lavine*, 497 F.2d 1208 (2d Cir. 1974). (A.157).

The majority decision of the Court of Appeals (per Judge Hays) acknowledged "that federal law prohibits a conclusive presumption of support. . . ." *Taylor v. Lavine*, 497 F.2d 1208, 1215 (2d Cir. 1974). (A.167). The majority decision held, however, that the challenged regulations do not presume that the non-legally responsible person is paying his or her share of the rent, but rather "are based on the fair inference from the presence of the lodger in the household that the A.F.D.C.–recipient family actually needs less space for its own use than it is paying rent for. . . . They merely prevent non-eligible persons from benefiting from free living space." *Taylor v. Lavine*, 497 F.2d 1208,

[18]The court denied two motions to intervene as parties plaintiffs as unnecessary because "the proposed intervenors fall within a class action designation." Hurley v. Van Lare, 365 F.Supp. 186, 195-197 (S.D.N.Y. 1973). (A.86-88).

1215-1216 (2d Cir. 1974). (A.168-169). Judge Oakes, dissenting, found that the challenged regulations violate the mandate of the Social Security Act, as interpreted by this Court, "that *a child's resources are to be measured in actuality, not on the basis of a presumption.*" *Taylor v. Lavine*, 497 F.2d 1208, 1219 (2d Cir. 1974). (A.176). (emphasis in original).[19]

The Court of Appeals found the constitutional claims substantial and remanded them for the convening of a three-judge court pursuant to 28 U.S.C. §§2281 and 2284. A consolidated three-judge court was convened and, on August 5, 1974, the three-judge court, by a two to one vote, held that the challenged regulations created a conclusive presumption in violation of the Due Process Clause that whenever there is a "lodger" in the home, the family has decreased shelter needs. *Hurley v. Van Lare*, 380 F.Supp. 167 (S.D. and E.D.N.Y. 1974). (A.639). The majority held that due process requires "the state [to] make an individualized determination of whether the presence of the lodger does *in fact* diminish the family's shelter needs." *Hurley v. Van Lare*, 380 F.Supp. 167, 175 (S.D. and E.D.N.Y. 1974) (A.653). (emphasis in original). The court found it unnecessary to decide the equal protection claim because it "overlaps" with the due process claim, and found no violation of the rights of privacy and association. (A.654-655).[20]

[19]On June 18, 1974, the Court of Appeals denied plaintiffs' petition for a rehearing *en banc*. Two Judges dissented from the denial of *en banc* review. (A.185-186).

[20]The action was recertified as a class action before the three-judge court, A.662, without opposition by defendants. (A.661).

Circuit Judge Hays, dissenting, found that "[i]t is clear that the New York regulation 'presumes' that a lodger has the will and means to contribute his or her share toward housing expenses. . .," but that these presumptions "may be refuted at the lodger's initiative" if the "lodger" applies for public assistance. *Hurley v. Van Lare*, 380 F.Supp. 167, 178 (S.D. and E.D.N.Y. 1974). (A.658).

On December 9, 1974, this Court noted probable jurisdiction to review the decision and judgment of the three-judge court in *Hurley v. Van Lare*, and granted the Petition for a Writ of Certiorari to review the decision and judgment of the United States Court of Appeals in *Taylor v. Lavine*.

SUMMARY OF ARGUMENT

I.

New York's "lodger" regulations work a reduction in the shelter allowance of a family receiving AFDC assistance solely because a parent allows a person who is not a recipient of public assistance and who has no legal obligation to support the AFDC family to reside in the home. These regulations cause a reduction in the shelter allowance even where the "lodger" has no available income. The AFDC family's shelter allowance is reduced despite the fact that the family's available income and shelter needs do not change as a result of the lodger's presence.

Plaintiffs contend that the "lodger" regulations conflict with 42 U.S.C. §§602(a)(7) and 606(a), and with 45 C.F.R. §233.90(a), as these provisions were

construed by this Court in *King v. Smith*, 392 U.S. 309 (1968) and *Lewis v. Martin*, 397 U.S. 552 (1970).

In *King v. Smith*, 392 U.S. 309 (1968), this Court held that Alabama's substitute father rule violated the Social Security Act. 42 U.S.C. §601 et seq. The Court held that Alabama's definition of "parent", which included a person with no legal obligation of support who in fact provided no support to the needy children, conflicted with 42 U.S.C. §606(a) and the purposes of the AFDC program and left Alabama's needy and dependent children "without meaningful protection." *King v. Smith*, 392 U.S. 309, 330 (1968). The Court held that the only kind of person whose presence in the home would adequately protect the children and thus justify the denial of AFDC assistance is one with an obligation of support equivalent to that of a natural parent. *King v. Smith*, 392 U.S. 309, 332 (1968).

The New York "lodger" has precisely the same characteristics that made the presence of Alabama's "substitute parent" insufficient to insure that needy and dependent children would be supported and protected. Both the New York "lodger" and Alabama's "substitute parent" (a) have no legal obligation to support the children and in fact provide no support, and (b) need not have any income or the capacity to earn income. A reduction in the AFDC family's grant solely because of the "lodger's" presence in the home violates 42 U.S.C. §606(a) and, to the extent of the reduction, leaves New York's needy and dependent children as unprotected as the Alabama children in *King*.

The lodger regulations conflict with 42 U.S.C. §602(a)(7) and 45 C.F.R. §233.90(a). The predecessor of section 233.90(a) was promulgated by HEW to

implement this Court's decision in *King*, and was held valid by this Court in *Lewis v. Martin*, 397 U.S. 552 (1970), because it implements 42 U.S.C. §602(a)(7) and furthers the purposes of the Social Security Act.

Section 233.90(a) provides that "the inclusion in the family, or the presence in the home, of a 'substitute parent' or 'man-in-the-house' or any individual other than [a person with a support obligation equal to that of a natural parent] is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State."

Section 233.90 prohibits the state from reducing the AFDC grant even where (a) the person in the home has some legal duty of support, but less than that of a natural parent, and (b) the person in the home in fact has income.

The New York regulations are based on the premise that the "lodger could, should, and therefore would, pay his or her proper share of the rent. . . ." *Hurley v. Van Lare*, 380 F.Supp. 167, 170 (S.D. and E.D.N.Y. 1974). (A.642). New York is attempting to accomplish indirectly by a double presumption that the "lodger" has available income *and* is applying it to the family's shelter expense what *Lewis* and 45 C.F.R. 233.90(a) clearly prohibit to be done by a single presumption that the available income of one with no legal obligation of support will be applied to meet the family's needs. *Hurley v. Van Lare*, 365 F.Supp. 186, 195 (S.D.N.Y. 1973). (A.85).

The fact that a "lodger" receives benefits and comforts from residing in the AFDC household was not an acceptable basis for terminating or reducing a family's assistance in *King* and *Lewis*, because a

reduction on this basis conflicts with the "paramount goal", *King v. Smith*, 392 U.S. 309, 325 (1968), of the AFDC program of protecting and aiding needy and dependent children. New York thus may not reduce the AFDC grant on this basis.

II

Despite the fact that New York purports to meet 100% of the needs of its public assistance recipients, New York Social Services Law, §131-a(1); 18 N.Y.C.R.R. §352.3, the challenged regulations work a reduction in the family's shelter allowance irrespective of whether the public assistance family's shelter needs have *in fact* decreased as a result of the "lodger's" presence in the home. Defendants make no determination (a) whether the lodger has paid part of the family's rental expense or is even capable of making such a payment, (b) whether the non-legally responsible person's presence in the home results in an increase in the family's rental expense, or (c) whether the "lodger's" presence means that the public assistance family has more space than necessary to meet its housing needs. The challenged regulations thus conclusively presume from the "lodger's" presence in the home that the "lodger" has paid part of the rent and that the public assistance family's shelter needs have decreased. This presumption is "not necessarily or universally true in fact." *Vlandis v. Kline*, 412 U.S. 441, 452 (1973). This presumption is thus a conclusive presumption which violates the Due Process Clause. *Cleveland Board of Education v. La Fleur*, 414 U.S.

632 (1974); *United States Department of Agriculture v. Murry*, 413 U.S. 508 (1973); *Vlandis v. Kline*, 412 U.S. 441 (1973); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Bell v. Burson*, 402 U.S. 535 (1971).

The State can reasonably make case by case determinations whether the family's shelter needs have *in fact* decreased at State fair hearings which the State provides pursuant to 18 N.Y.C.R.R. Part 358. The factual issues to be resolved are the same issues that HEW, 45 C.F.R. §233.90(a), and this Court, *Lewis v. Martin*, 397 U.S. 552 (1970), have concluded must be determined on an individualized basis.

III.

The challenged regulations create two classes of equally needy families receiving public assistance. One class, consisting of families in which no lodger resides, receives a full grant of assistance. The second class, despite being equally needy, receives a reduced grant of assistance solely because the parent allows a non-legally responsible person who is not a recipient of public assistance to reside in the home.

A parent's decision to allow another person to reside in the home is constitutionally protected by the related rights of privacy and association. See *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965). See also *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973). The classification created by the challenged regulations infringes on these constitutionally protected rights because the family is penalized, by a reduction in its

public assistance grant, for choosing to allow another person to reside with them. Should this person leave the public assistance household, the full public assistance grant is restored. No matter how little space the family has and no matter how low its rental expense, its public assistance grant is reduced if it chooses to allow this person to live in their home.

Because the regulations infringe upon the rights of privacy and association, defendants must show a compelling interest to justify the classification created. See *Roe v. Wade*, 410 U.S. 113, 155 (1973); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Sherbert v. Verner*, 374 U.S. 398 (1963). No compelling interest exists because the State has a reasonable alternative method to accomplish its interest of ensuring that it not expend more funds than necessary to meet the needs of those eligible for public assistance. The State can make individualized determinations at State "fair hearings" of whether a family's shelter needs have in fact decreased, thus justifying a reduction in the family's grant.

Even if judged by the rational basis test, *Dandridge v. Williams*, 397 U.S. 471 (1970), the regulations violate the Equal Protection Clause because they arbitrarily work a reduction in the family's public assistance grant since the grant is reduced despite the fact that the public assistance family unit and its shelter needs and rental obligation remain unchanged as a result of the parent's decision to invite the "lodger" into the home. A reduction in the public assistance grant under these circumstances does not further any legitimate governmental interests.

ARGUMENT

I.

THE PRO-RATA REDUCTION OF THE SHELTER ALLOWANCE OF A FAMILY RECEIVING AFDC ASSISTANCE, SOLELY BECAUSE A PARENT ALLOWS A NON-LEGALLY RESPONSIBLE PERSON TO RESIDE WITH THE AFDC FAMILY, VIOLATES THE SOCIAL SECURITY ACT AND IMPLEMENTING HEW REGULATIONS.

It is well established that states participating in the AFDC program must comply with the provisions of the Social Security Act of 1935 as amended, 42 U.S.C. §601 et seq., "and with rules and regulations promulgated by H.E.W.." *King v. Smith*, 392 U.S. 309, 317, 333 fn. 34 (1968). Accord, *Shea v. Vialpando*, 416 U.S. 251 (1974); *Carleson v. Remillard*, 406 U.S. 598 (1972); *Townsend v. Swank*, 404 U.S. 282 (1971); *Rosado v. Wyman*, 397 U.S. 397 (1970); *Lewis v. Martin*, 397 U.S. 552 (1970).[21] State statutes and regulations that conflict with these federal provisions are invalid under the Supremacy Clause of the Constitution. See *Townsend v. Swank, supra* at 285.

Plaintiffs contend that the challenged state regulations, which cause a reduction in the shelter allowance received by an AFDC family solely because the parent allows a non-legally responsible person to reside in the

[21]New York receives approximately $570,000,000 from the United States government for its AFDC program. The Annual Report of the New York State Department of Social Services, Appendix B (1974).

home, conflict with the Social Security Act and implementing HEW regulations, and are therefore invalid under the Supremacy Clause.

A. *King v. Smith*, 392 U.S. 309 (1968), *Lewis v. Martin*, 397 U.S. 552 (1970), And 45 C.F.R. §233.90(a) Forbid New York From Assuming That A "Lodger" Is Paying Part Of The AFDC Family's Rental Expense.

The "paramount goal" of the federal AFDC program is the furnishing of aid and resources to protect needy and dependent children. *King v. Smith*, 392 U.S. 309, 325 (1968). Accord, *Shea v. Vialpando*, 416 U.S. 251 (1974); *Wyman v. James*, 400 U.S. 309, 318 (1971); 42 U.S.C. §§601, 606. The Social Security Act defines a "dependent child" as a "needy child . . . who has been deprived of parental support or care by reason of the death, continued absence from the home or physical or mental incapacity of a parent . . .", and who is living with a specified relative. 42 U.S.C. §606(a).

In order to carry out this goal, Congress has required the states to determine eligibility and the amount of AFDC benefits to which a family is entitled on the basis of actual rather than assumed income and resources, and to refrain from declaring needy and dependent children ineligible or reducing their assistance because of their caretaker relatives' association with a "substitute" parent or any other person who does not have a legal obligation to support the children equivalent to that of a natural parent. 42 U.S.C. §602(a)(7); *Lewis v. Martin*, 397 U.S. 552 (1970); *King v. Smith*, 392 U.S. 309 (1968). See also *Shea v. Vialpando*, 416 U.S. 251 (1974).

The challenged regulations clash with these fundamental principles. The regulations cause a reduction in the AFDC family's shelter allowance *solely* because a caretaker relative allows a non-legally responsible person to reside with the AFDC family. The grant is reduced even though this person makes no constribution to the AFDC family, and even though he or she may be unable to make such a contribution. The family's shelter allowance is reduced despite the fact that there has been no change in the rental expense to the family or the State, and despite the fact that there has been no change in the family's shelter needs. In sum, the family's shelter allowance is reduced even though the AFDC family unit and its income, resources and needs remain unchanged in law and in fact. See, *Boucher v. Minter*, 349 F.Supp. 1240, 1244 (D. Mass. 1972) (three-judge court).

The challenged regulations thus thwart the congressional goal of aiding and protecting needy and dependent children. More specifically, the regulations operate so as (1) to define "parent" in a manner that conflicts with 42 U.S.C. §606(a), as construed by this Court in *King v. Smith*, 392 U.S. 309 (1968), and (2) to presume the availability of income and decreased shelter need in conflict with 42 U.S.C. §602(a)(7) and 45 C.F.R. §233.90(a), as construed by this Court in *Lewis v. Martin*, 397 U.S. 552 (1970).[22]

In *King v. Smith, supra*, this Court invalidated Alabama's substitute father rule. That rule disqualified from AFDC eligibility needy children whose mothers cohabited in the home or elsewhere with a male who was "not the father of any of [the] children, [was] not

[22]45 C.F.R. §233.90(a) was previously 45 C.F.R. §203.1.

legally obligated, under Alabama law, to support any of [the] children [and] was not willing or able to support the . . . children, and [did] not in fact support them." *King v. Smith*, 392 U.S. 309, 315-316, 329 (1968).

This Court held that Alabama's definition of "parent", as including a person with no legal obligation of support and who in fact provided no support to the needy children, conflicted with 42 U.S.C. §606(a) and the purposes of the AFDC program and left Alabama's needy and dependent children "without meaningful protection." *King v. Smith*, 392 U.S. 309, 330 (1968). "[T]he only kind of 'parent,' under §406(a), whose presence in the home would provide adequate economic protection for a dependent child is one who is legally obligated to support him." *King v. Smith, supra* at 332. The state's "interest in economically allocating its limited AFDC resources [is] protected by its undisputed power to set the level of benefits and the standard of need, and by its taking into account in determining whether a child is needy all actual and regular contributions to his support." *King v. Smith, supra*, at 334.

The New York "lodger" has precisely the same characteristics that made the presence of Alabama's substitute parent insufficient to ensure that needy and dependent children would be supported and protected. *Taylor v. Lavine*, 497 F.2d 1208, 1217 (2d Cir. 1974) (Oakes, J., dissenting). (A.173). In each case the "person-in-the-home" has no legal obligation to support the children and in fact provides no support. Both rules operate irrespective of the amount of income of the "person-in-the-home," and irrespective of his or her capacity to earn income. Both the Alabama rule and New York's regulations are "unrelated to need, because

the actual financial situation of the family is irrelevant. . . ." *King v. Smith*, 392 U.S. 309, 320 (1968). The only difference between Alabama's rule and New York's regulations is that New York, rather than completely denying assistance because the caretaker relative allows a non-legally responsible person to reside in the home, reduces the AFDC grant for this reason.[23] This Court in *King*, however, did not imply that a state may reduce rather than deny AFDC assistance upon the fiction that the children's needs have decreased as a result of the presence in the home of a person with no legal obligation of support. To the extent of this reduction, New York's children are left "without meaningful protection." *King v. Smith*, 392 U.S. 309, 330 (1968). They are deprived of AFDC assistance despite the fact that the family's resources, rental obligation and needs remain unchanged.

While the "lodger" regulations are applied whenever any non-legally responsible person resides in the public assistance family's home, and not only when an adult male resides in the home, this does not lessen the applicability of *King* since the children are equally needy and dependent whether the person in the home is a "substitute father," a disabled sister, an unemployed adult son or any other non-legally responsible

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[23] "The New York regulation . . . determines the level of payment to the eligible family on the basis of the presence or absence of a lodger in the recipient household." Taylor v. Lavine, 497 F.2d 1208, 1214 (2d Cir. 1974). (A.166).

individual.[24] The essential point is that the "lodger", like Alabama's substitute parent, does not have the characteristics of a "parent", 42 U.S.C. §606(a), that provide the children with meaningful protection.

This Court in *King* recognized that the dimension of the question at issue extended beyond state rules which disqualified the AFDC children on the basis of a fictional parent, to any rule which assumed resources and income available to needy children which were not in fact available. *King v. Smith*, 392 U.S. 309, 319 fn. 16 (1968). The Court recognized the close relationship between the definition of "parent" in 42 U.S.C. §606(a) and the definition of available income and resources in 42 U.S.C. §602(a)(7)[25] and implementing HEW regulations. *Id.*

Following this Court's decision in *King*, HEW promulgated regulations designed to implement 42 U.S.C. §606(a). *Lewis v. Martin*, 397 U.S. 552, 554 (1970). These regulations provide that "*the inclusion in the family, or the presence in the home, of a 'substitute parent'* or *'man-in-the-house' or any individual other than* [*a natural or adoptive parent* or stepparent with a

[24]Neither the Alabama substitute parent rule nor those of other states dealt with a person who even purported to carry out the role of a parent. For example, it was not even necessary that the substitute parent in *King* reside in the home. King v. Smith, 392 U.S. 309, 314 (1968). "The men might meet neither the common sense nor the legal definition of 'parent', but the presumption of their existence could disqualify needy children from public aid. "W. Bell, Aid to Dependent Children, pp. 85-86, 90 (1965). Thus, whether the New York "lodger" assumes a parental role is irrelevant to the issue presented.

[25]42 U.S.C. §602(a)(7) provides that "in determining need" the state shall "take into consideration any income and resources of any child or relative claiming aid to families with dependent children. . . ."

support obligation equivalent to that of a natural or adoptive parent] *is not an acceptable basis* for a finding of ineligibility or *for assuming the availability of income by the State.* In establishing financial eligibility and the *amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered. . . .*" (emphasis added). 45 C.F.R. §233.90(a). Accord, 45 C.F.R. §233.20(a)(3)(ii).[26]

The United States, in an *amicus curiae* brief submitted to this Court in *Lewis v. Martin*, 397 U.S. 552 (1970), stated that 45 C.F.R. §203.1, which is now 45 C.F.R. §233.90(a), clearly prohibited the states from terminating or reducing the AFDC grant solely because a non-legally responsible person resides in the home:

> "[T]he HEW regulations governing State AFDC plans provide that the eligibility of a child for assistance and the *amount of assistance* shall be determined without regard *to the presence in the home of any person other than one having the same obligation of support as a natural or adoptive parent*, except to the extent that a person without such an obligation is shown to be making actual contributions to the support of the child for current use on a regular basis." Brief of the United States as Amicus Curiae in *Lewis v. Martin*, February, 1970, p. 7 (emphasis added).

[26]The present regulations represent a reaffirmation of HEW's earlier rulings. Lewis v. Martin, 397 U.S. 552, 554 (1970). HEW's prior interpretations appeared in Minutes of the Social Security Board, December 17, 1940, Board Document No. 3950-h, pp. 1-3; HEW Handbook of Public Assistance, Part IV, §§3120, 3131(7) and 45 C.F.R. 203.1. The entire text of 45 C.F.R. §233.90(a) appears as an Exhibit to the Brief of Appellants-Respondents.

The validity of 45 C.F.R. §203.1 was unanimously upheld by this Court in *Lewis v. Martin*, 397 U.S. 552 (1970) on the grounds that it is consistent with the rationale of *King*, furthers the purposes of the Social Security Act, and implements 42 U.S.C. §602 (a)(7). The *Lewis* court held that this regulation is designed to protect needy and dependent children by ensuring that they are not denied, or do not receive a *reduced* grant of AFDC assistance because of the presence of *any* person in the home who does not have a legal duty of support equal to that of a natural parent, and who does not in fact make financial contributions to the family.

Indeed, 45 C.F.R. § 233.90(a) and *Lewis* prohibit the states from reducing the AFDC grant even where (a) the person in the home has *some* legal duty of support, but less than the duty of a natural parent,[27] and (b) the person in the home in fact has income. *Lewis v. Martin*, 397 U.S. 552, 556-560 (1970). A person's presence in the home can serve as a basis to terminate or reduce the family's assistance only if this person has an obligation of support equal to that of a natural parent, or, if this person has a lesser obligation of support, to the extent

[27]The man assuming the role of spouse in *Lewis* did have a legal duty of support. Lewis v. Martin, 397 U.S. 552, 553 n. 2 (1970).

that this person makes actual or regular contributions of support.[28] The Court in *Lewis* stated:

> "H.E.W. . . . has apparently concluded that as a matter of current practical realities, the relationship of the MARS to the home is less stable than that of the stepfather . . . and that the likelihood of the MARS' contributing his income to the children—even if legally obligated to do so—is sufficiently uncertain in the absence of the marriage tie, to prevent viewing him as a 'breadwinner' unless the bread is actually set on the table." *Lewis v. Martin, supra* at 559.

New York children who reside in a home in which a "lodger'. is present are even less protected than the children in *Lewis* who resided with a man assuming the role of a spouse or a stepfather since the family's shelter allowance is reduced (a) even though the New York "lodger" is present are even less protected than the to any extent, and (b) even if the "lodger" has no available income or resources.

New York is thus attempting to accomplish by a double presumption that the "lodger" has available income *and* is applying it to the family's shelter expense, what *Lewis* and 45 C.F.R. § 233.90(a) clearly forbid to be done by the one presumption that a person in the

[28]Other cases in which the courts found it impermissible for the states to assume that the available income of a non-legally responsible person is available for the AFDC children include Rodriquez v. Vowell, 472 F.2d 622 (5th Cir.), cert. denied, 412 U.S. 944 (1973); Reyna v. Vowell, 470 F.2d 494 (5th Cir. 1972); Gaither v. Sterrett, 346 F.Supp. 1095 (N.D. Ind.), aff'd, 409 U.S. 1070 (1972); Gilliard v. Craig, 331 F.Supp. 587 (W.D. N.C. 1971), aff'd, 409 U.S. 807 (1972), Solman v. Shapiro, 300 F.Supp. 409 (D. Conn.) (three-judge court), aff'd, 396 U.S. 5 (1969).

home with no parental duty of support will apply his *available* income to meet the family's needs. As the single judge in the *Hurley* action concluded:

> "[T]he regulations here under scrutiny are in one sense far cruder than were those at issue in *Lewis v. Martin, supra*. The California statutes at least took into account the income of the stepfather or MARS in computing the stipend payable to the family. The New York regulations reduce the rental stipend *regardless* of the lodger's income. Hence children who could qualify for a full stipend under the California plan (i.e., if the MARS in fact had no income) would have their rental stipend reduced under the New York scheme." *Hurley v. Van Lare*, 365 F.Supp. 186, 195 (S.D.N.Y. 1973). (A.85) (emphasis in original)

The challenged regulations sharply conflict with and frustrate the holdings and purposes of *King, Lewis* and 45 C.F.R. § 233.90(a). Federal and state courts have thus consistently invalidated regulations identical or similar to the New York lodger regulations. *Roselli v. Affleck*, ___F.2d___, No. 74-1084 (1st Cir., Dec. 31, 1974) (slip opinion, 7-8), *aff'g*, 373 F.Supp. 36, 46-47 (D.R.I. 1973); *Mothers and Childrens Rights Organization v. Stanton*, 371 F.Supp. 298 (N.D. Ind. 1973); *Owens v. Parham*, 350 F.Supp. 598 (N.D. Ga. 1972) (three-judge court); *Hausman v. Department of Institutions and Agencies*, 64 N.J. 203, 314 A.2d 362, *cert denied*, 94 S.Ct. 3083 (1974). See also *Boucher v. Minter*, 349 F.Supp. 1240 (D. Mass. 1972) (three-judge court); *Jenkins v. Georges*, 312 F.Supp. 289 (W.D. Pa. 1969) (three-judge court); *Waits v. Swoap*, 11 Cal. 3d 887, 115 Cal.Rptr. 21, 24-25, 524 P.2d 117, 120-121 (alternative holding), *cert denied*, 95 S.Ct. 499 (1974); *Cooper v. Swoap*, 11 Cal. 3d 856, 115 Cal.Rptr. 1, 9-11, 524 P.2d. 97, 105-107 (1974) (alternative holding), *cert denied*, 95 S.Ct. 498 (1974); *Matter of Battle v. Lavine*, 44 App.Div.2d 307, 354 N.Y.Supp.2d 680 (2d Dept. 1973). Cf. *Randall v. Goldmark*, 495 F.2d 356, 358 (1st Cir.), *cert denied*, 95 S.Ct. 144 (1974).[29]

B. The History, Language, and Operation Of The Challenged Regulations Substantiate That The "Lodger" Regulations Are Based On The Impermissible Assumption That The "Lodger" Is Paying A Pro-rata Share Of The AFDC Family's Rental Expense.

The history of the challenged regulations, their language, their operation and HEW's interpretation of them make it clear that they are based on the impermissible assumptions "that the lodger could, should, and therefore would, pay his or her proper share of the rent. . . ." *Hurley v. Van Lare*, 380 F.Supp. 167, 170 (S.D. and E.D.N.Y. 1974).

Prior versions of the challenged regulations combined elements of both the substitute parent rule in *King* and

[29] In Randall v. Goldmark, 495 F.2d 356, 358 (1st Cir. 1974), the First Circuit stated that the shelter allowance may be reduced "[t]o the extent that such shelter costs are actually reduced by third parties, . . ." The *dictum* to the contrary in Dullea v. Ott, 316 F.Supp. 1273 (D. Mass. 1970) deals only with the validity of the reduction in the grant as a matter of substantive due process. In addition, the "Group II" classification in Massachusetts, discussed in *dictum* in Dullea v. Ott, supra and Boucher v. Minter, supra at 1245 is no longer in operation pursuant to a consent decree in Bower v. Goldmark, D. Mass. No. 74-82-M, Final Decree entered July 9, 1974. The other cases cited by defendants in their Brief, pp. 37-38, stand for the proposition that the needs of the family are not diminished because of the presence in the household of a non-recipient.

the "MARS" rule in *Lewis*, and they have not been changed in any manner that cures their defects.

New York Regulations filed prior to *King* provided that a non-recipient, non-parent relative residing in the household "shall be presumed to be self-maintaining and paying $90 a month for room and board." 18 N.Y.C.R.R. § 353.2(b).[30] Another regulation promulgated in 1965 provided that a non-legally responsible relative living in the home who is willing to have his income applied to the needs of the public assistance family "should be asked to contribute 50 percent of the surplus income to the support of the . . . recipient." 18 N.Y.C.R.R. § 353.3(a). If the non-legally responsible relative or friend was "unwilling to contribute" to this extent, the family's grant was reduced "by an amount equal to the difference between the prevailing commercial rate for room and board and the cost attributable to his living in the home." 18 N.Y.C.R.R. § 353.3(c).

Sections 353.2 and 353.3 were repealed effective June 1, 1970. On this date, section 352.30(c), which is now section 352.30(d), and section 352.31(a)(3), which is now section 352.31(a)(3)(iv), were enacted. Section 352.30(c) "deemed" the non-legally responsible person a "lodger."[31] Section 352.31(a)(3), enacted June 2, 1970,

[30]The prior New York regulations referred to are set forth in Appendix "A" to this Brief. See also A.189-199.

[31]The term "lodger" apparently derives from previous versions of fit mother or suitable home requirements and man in the house rules that existed in some of the states prior to this Court's decision in King v. Smith, 392 U.S. 309 (1968). W. Bell, Aid to Dependent Children 7, 12-13, 85-86, 118 (1965). By the late 1950's "various versions of the 'substitute parent' concept existed in state plans: the 'nonstable, non-legal' union in Arkansas, the 'male boarder' in Michigan, 'Roger the Lodger' in Oregon, the 'unrelated man living in the home' in Alabama. . . ." Id. at 85-86.

shortly after *Lewis* was decided, provided:

> "If a female . . . recipient is continuously cohabiting with a man to whom she is not married, his income and resources shall, if he agrees, be considered in determining the family's eligibility for assistance. If he is not aggreable to such arrangement, his available income and resources shall be applied against his prorated share of the family's shelter needs, . . . and against the needs of the . . . recipient in consideration of her services as a housekeeper."

This provision was in direct conflict with *Lewis*.

Both sections were amended on September 1, 1970 to substantially their present form.[32] While the prior regulations applied only the "lodger's" actual income to the family's needs, the present regulations work a reduction in the grant whether or not the "lodger" has any income or resources. This amendment thus places into operation the double presumption of available income and contribution to replace the single presumption of contribution previously held invalid in *Lewis*.

The language of the challenged regulations substantiates that they operate to presume that the lodger is paying his share of the rent. Section 352.31(a)(3) provides that when the recipient is living with a non-legally responsible person, "The *available income and resources of such person shall be applied* in accordance with the following: . . . (iv) . . . such person shall be treated as a lodger in accordance with subdivision

[32]Section 352.30(c) was renumbered section 352.30(d) on August 26, 1971. (A.73) On April 2, 1973, the reference in section 352.31(a)(3)(iv) to section 352.30(c) was corrected to refer to section 352.30(d). Historical note to 18 N.Y.C.R.R. §352.31.

(d) of section 352.30 of this Part." (emphasis added). Section 352.30(d) provides that "(a) non-legally responsible relative or unrelated person in the household . . . shall be deemed[33] to be a lodger . . . *In the event a lodger does not contribute at least $15 per month, the family's shelter allowance . . . shall be a pro-rata share of the regular shelter allowance.*" (emphasis added). Indeed, defendants acknowledged in the Court of Appeals that the regulations "embod[y] a judgment of the Department of Social Services that, in general, lodgers residing with A.F.D.C. recipients should be required to pay their pro rata share of the housing cost. .,. ." Brief for Appellants Lavine and Van Lare in United States Court of Appeals, December 4, 1973, p. 35. Accord, Defendants' Memorandum of Law in the United States District Court in *Hurley v. Van Lare*, February 23, 1973, p. 22-23 (The regulations leave "the lodger and non-eligible to pay his own way."); Brief in Opposition to Petition for Writ of Certiorari, p. 9.

The operation of the regulations further shows that they are based on the assumption that the "lodger" is paying part of the family's shelter expense. The AFDC family's shelter obligation is fixed by the family's agreement with the landlord. Defendants initially compute the family's shelter allowance based on the shelter needs of the number of eligible persons in the home and their rental obligation. 18 N.Y.C.R.R. § 352.3(a). The AFDC family's shelter needs do not decrease unless the "lodger" pays part of the family's

[33]"Deeming is a familiar legal device to evade applicable requirements by saying that they have been satisfied when they have not in fact been satisfied." New York State Department of Social Services v. Dublino, 413 U.S. 405, 426 (1973) (Marshall & Brennan, J. J. dissenting).

rental expense. Defendants' reduction of the AFDC shelter allowance must thus be based upon the assumption that the "lodger" is in fact paying his share of the rent. *Mothers and Childrens Rights Organization v. Stanton*, 371 F.Supp. 298, 302 (N.D. Ind. 1973); *Owens v. Parham*, 350 F.Supp. 598, 604 (N.D. Ga. 1972); *Hausman v. Department of Institutions and Agencies*, 64 N.J. 204, 314 A.2d 362, 365-366, *cert. denied*, 94 S. Ct. 3083 (1974); *Jenkins v. Georges*, 312 F.Supp. 289, 291-292 (W.D. Pa.) (1969) (three-judge court).[34] This is precisely the presumption of income contribution that is forbidden by *King, Lewis*, and 45 C.F.R. § 233.90(a).

The conclusion that the regulations are based upon an impermissible assumption of income is buttressed by the action taken by HEW when New York's AFDC plan was submitted to it for approval. 42 U.S.C. § 602. The challenged regulations were "marked as not approved" by HEW because

> "The Plans of other states which we looked at did not set an amount of assumed payment–as the N.Y. regulation seems to do–but used a graduated chart

[34]The "fair hearing" decisions contain specific findings by defendants that the "lodger" is not willing to assume responsibility for the support of the family and in fact has made no contribution to the family, or paid part of the rent. (A. 37, 120, 214).

to show how shelter and utility cost were to be pro-rated in a 'mixed household.' "[35]

Thus, the history, language, and operation of the "lodger" regulations, and HEW's action, make it clear that the "lodger" regulations are based on the impermissible assumption that the lodger is paying his share of the rent.

C. The Decision Of The Court of Appeals Is Based On The Erroneous Premise That The AFDC Family's Shelter Needs Are Diminished Solely Because A "Lodger" Resides In The Home.

Judge Hays, writing for the majority of the Court of Appeals, acknowledged "that federal law prohibits a conclusive presumption of support," but found that the challenged regulations are not based on such a presumption but "on the fair inference . . . that the AFDC family actually needs less space for its own use than it is paying rent for." *Taylor v. Lavine*, 497 F.2d

[35]Letters from Catherine M. Miller, Acting Chief, State Plan and Program Characteristics Branch of HEW to plaintiffs' counsel, August 7, 1974 and September 10, 1974, which are set forth in Appendix "B" to this Brief, together with other HEW correspondence concerning the "lodger" regulations. In view of the positions contained in these two letters, which are dated subsequent to the letter of the Regional Commissioner of HEW relied upon by defendants, (A. 155-156) HEW's position is at best ambiguous. See also King v. Smith, 392 U.S. 309, 317 n. 11 (1968). In light of HEW's consistent interpretation of 42 U.S.C. §602(a)(7), and its specific action in marking the challenged regulations "not approved," its "ad hoc" position in the letter relied upon by defendants "cannot stand." See United States v. Leslie Salt Co., 350 U.S. 383, 396 (1956).

1208, 1215 (2d Cir. 1974). (A.167-168). However, in dissenting from the decision of the three-judge district court on the constitutional claims, Judge Hays stated that "it is . . . clear that the New York regulation 'presumes' that a lodger has the will and means to contribute his or her fair share toward housing expenses. . . ." *Hurley v. Van Lare*, 380 F.Supp. 167, 178 (S.D. and E.D.N.Y. 1974). (A.658). If Judge Hays had reached this conclusion in the Court of Appeals, he would have had to conclude that the lodger regulations constitute "a conclusive presumption of support" prohibited by "federal law". *Taylor v. Lavine*, 497 F.2d 1208, 1215 (2d Cir. 1974). (A.167).[36]

The Court of Appeals held that the state can reduce the grant "on the basis of the presence or absence of a lodger in the recipient household" if this method "realistically determines the level of need." *Taylor v. Lavine*, 497 F.2d 1208, 1214-1215 (2d Cir. 1974). (A.167). The Court of Appeals found that "the New York scheme . . . accounts for the actual cost of housing to an AFDC-recipient family." *Taylor v. Lavine*, 497 F.2d 1208, 1216 (2d Cir. 1974). (A.169).

However, the family's shelter needs and costs do not decrease solely because the family allows another person to reside with them. The lodger's presence in the home can only justify the conclusion that the AFDC family's

[36]Whether the presumption is that the 'lodger" is making the payment to the AFDC family or directly to the landlord, the effect is the same. Since the AFDC family must meet its total rental obligation, in either case there is a presumption of a payment made for the benefit of the AFDC family. See Randall v. Goldmark, 495 F.2d 356, 361 (1st Cir.), cert. denied, 95 S. Ct. 144 (1974) (mortgage payment made by estranged husband directly to mortgagee is currently available resource of AFDC family.)

shelter needs and costs have decreased under two circumstances: (a) if the lodger pays part of the rent, in which case the AFDC family's rental cost diminishes by the amount of the payment, or (b) if the lodger's presence reflects the existence of excess space in the AFDC family dwelling. Defendants, however, make no determination whether the family's shelter needs have in fact decreased. A reduction in the grant based upon the assumption that the family's shelter needs have decreased by virtue of the lodger's presence has precisely the same effect as a presumption of the availability of the lodger's income, since needs and income are opposite sides of the same ledger. See *Owens v. Parham*, 350 F.Supp. 598, 604-605 (N.D. Ga. 1972) (three-judge court).[37] Such a reduction violates Congress' intent

> "[f]rom the inception of the Act . . . that the amount of assistance actually paid is based on the amount needed in the *individual* case after other income and resources are considered." *Shea v.*

[37]When substitute parent rules replaced suitable home policies, "[t]he interchangeability of welfare policies [was] exceedingly obvious. . . . In Louisiana the new definition of 'needy child' was challenged successfully, whereupon the material was simply moved over to the section of the state plan entitled 'Deprivation of Parental Support'. . . ." W. Bell, Aid to Dependent Children 85 (1965). Judge Oakes, dissenting in the Court of Appeals, found that "the amount of available living space, like support payments, is an available resource" and that "in place of a presumption of support, the majority substitute a *conclusive presumption that whenever there is a 'lodger' the family has more space than it needs.* As such, it may well be contrary to fact: The older brother may be sharing a single bed with a younger one; the disabled sister may be sleeping on the couch." Taylor v. Lavine, 497 F.2d 1208, 1219 (2d Cir. 1974). (A.176-177). (emphasis in original).

> *Vialpando*, 416 U.S. 251, 94 S.Ct. 1746, 1754 (1974). (Emphasis in original).

To reduce the family's shelter allowance when the "lodger" has not contributed to the family's shelter expense and the family's shelter needs have not changed "means that the cost of living remains the same for the assistance recipients comprising the household, but the benefits received are less and not enough to meet it. Consequently the dependent child—the primary object of the program—suffers." *Hausman v. Department of Institutions and Agencies*, 64 N.J. 203, 314 A.2d 362, 366 (1974), *cert. denied*, 94 S. Ct. 1083 (1974).[38] The inevitable result is that the family will either face eviction or will have to use funds from its basic grant for food and clothing to meet its rental obligation. *Hurley v. Van Lare*, 365 F.Supp. 186, 195 (S.D.N.Y. 1973); *Boucher v. Minter*, 349 F.Supp. 1240, 1245 (D. Mass. 1972) (three-judge court).

It is clear that reductions pursuant to the challenged regulations are not based upon changed shelter needs. Should the AFDC family move to a smaller and less expensive apartment, no matter how small and no matter how low the rent, the shelter allowance will be reduced if the "lodger" continues to reside in this smaller

[38]A reduction in the family's shelter allowance when its shelter needs have not in fact changed also conflicts with HEW regulations prohibiting "inequitable treatment . . . in the light of the provisions and purposes of the public assistance titles or the Social Security Act", 45 C.F.R. §233.10(a)(ii), and requiring "that the determination of need and amount of assistance for all . . . recipients will be made on an objective and equitable basis. . . ," 45 C.F.R. §233.20(a)(i). See Hausman v. Department of Institutions and Agencies, supra; Mothers and Childrens Rights Organization v. Stanton, 371 F. Supp. 298, 303 (N.D. Ind. 1973); Marotti v. White, 342 F. Supp. 823 (D. Conn. 1972) (three-judge court).

apartment.[39] If the lodger leaves the household, the full shelter allowance is restored. These actions are inconsistent with the claim that the reduction in the grant is based on changed housing needs. *Taylor v. Lavine*, 497 F.2d 1208, 1219 n.8 (2d Cir. 1974) (Oakes, J., dissenting). (A.176)

The Court of Appeals found that "it is clear that the New York regulations are based on the fair inference from the presence of the lodger in the household that the AFDC–recipient family actually needs less space for its own use than it is paying rent for." *Taylor v. Lavine*, 497 F.2d 1208, 1215 (2d Cir. 1974). (A.168). Defendants have never, however, claimed this to be the basis for their regulations and have specifically disclaimed it as their basis in this Court. Jurisdictional Statement, p. 23 n.; Application for A Stay Pending Appeal to United States Supreme Court pp. 15-16; *Taylor v. Lavine*, 497 F.2d 1208, 1219 (2d Cir. 1974) (Oakes, J., dissenting). (A.176).[40] Moreover, public assistance recipients generally do not reside in quarters which are larger than

[39]Judge Bauman: "[T]he rental allowance would again be diminished until they moved into a postage stamp. . . ."

Mrs. Gordon (Ass't Att'y General): "If they then say, gee, if we move to a smaller apartment, maybe we will do better, the regulation comes into play again and a share of the smaller apartment is taken away. In that statement, you are absolutely correct, your Honor."

Judge Bauman: "It comes down to one-third of nothing."

Mrs. Gordon: "If they live in a chicken coop it would be a pro-rated share of the chicken coop. . . ." (A.333-334).

[40]Defendants' expert witness, a Senior Program Specialist for the New York State Department of Social Services, (A.257), testified that "you have a set amount of space that you and your family are living in. If someone else comes to live with you, this is not to say that before you had too much space." (A.348).

necessary to meet their needs. Rather, they generally reside in highly overcrowded quarters. (A.246-248, 324, 367, 369-374, 412-413, 456, 471-472, 474-476, 649-650). Since defendants initially compute the shelter grant to meet the shelter needs of the number of eligible persons in the home, 18 N.Y.C.R.R. § 352.3(a), it cannot be said that New York is providing its recipients with more funds than are necessary to meet their housing needs. That the existence of excess space is not the basis for the regulations is made clear by the facts that (a) the full shelter allowance is restored if the lodger moves out, and (b) the grant is reduced even if the family moves to a smaller apartment with a lower rental and the lodger goes with them.

The Court of Appeals also found that the reduction in the grant "accounts for the economies of scale that are realized when individuals live in groups. . . . [Mrs.] Hurley, her three children, and her lodger can live at a lower per capita housing cost than can Hurley and her children alone." *Taylor v. Lavine*, 497 F.2d 1208, 1215 (2d Cir. 1974). (A.168-169). There is no economy of scale, however, solely because another person joins the household; if the lodger does not pay his share of the rent, the total housing cost to the AFDC family remains the same. *Taylor v. Lavine*, 497 F.2d 1208, 1222 (2d Cir. 1974) (Oakes, J., dissenting). (A.182-183). See also, *Hausman v. Department of Institutions and Agencies*, 64 N.J. 203, 314 A.2d 362, 366, *cert. denied*, 94 S.Ct. 3083 (1974); *Mothers and Childrens Rights Organization v. Stanton*, 371 F.Supp. 298, 302 (N.D. Ind. 1973); *Jenkins v. Georges*, 312 F.Supp. 289, 291-292 (W.D. Pa. 1969) (three-judge court).

The concept of an economy of scale applies to variable costs where increased quantity may lead to a lower per

capita cost, because of the lower costs of the incremental units. There can be no economy of scale where the commodity and its costs are, like shelter, fixed.[41] Per capita housing costs can only decrease if the lodger pays his share of the rent. Cf. *Mothers and Childrens Rights Organization v. Stanton*, 371 F.Supp. 298, 302 (N.D. Ind. 1973). Reliance upon an economy of scale theory to support the challenged regulations is thus based on the impermissible assumption that the "lodger" is paying part of the rent. 45 C.F.R. § 233.90; *Taylor v. Lavine*, 497 F.2d 1208, 1222 (2d Cir. 1974) (Oakes, J., dissenting). (A.183).

The Court of Appeals also held that the challenged regulations prevent the use of AFDC funds by non-eligible persons by preventing them "from benefiting from free living space." *Taylor v. Lavine*, 497 F.2d 1208, 1216 (2d Cir. 1974). (A.169). This is refuted by an analysis of defendants' shelter policies and the operation of the challenged regulations. The AFDC family in New York receives a grant based on its total living needs, including shelter. *New York Social Services Law* § 131-a; 18 N.Y.C.R.R. § 352.3(a). Defendants reduce plaintiffs' grant even though the lodger's presence does not result in

[41]The economies of scale are appropriately taken into consideration when the maximum rent schedules are computed. 18 N.Y.C.R.R. §352.3(a). Cf. Mothers and Childrens Rights Organization v. Stanton, 371 F.Supp. 298, 301-302 (N.D. Ind. 1973). In addition, a pro-rata reduction in the shelter grant is inconsistent with the notion of an economy of scale which properly relates to decreased incremental costs. Prior to the decision of the Court of Appeals, defendants did not assert in the courts below that the challenged regulations were justified by an economy of scale, and do not appear to rely on it in this Court.

an increase in the rental expense to the family or the State. Even if the family could find and move into a smaller apartment at a lower rental, if the family chose to allow the "lodger" to reside with them in this smaller apartment, defendants would again reduce the shelter allowance. In sum, the regulations operate against the AFDC family rather than against the lodger,[42] and do not prevent the "lodger" from residing in the home. The lodger is not the recipient of any funds from the State. He

> "is rather the 'beneficiary' of the AFDC family's generosity, and more likely that of the AFDC children's mother. . . . If a lodger . . . is invited into the household, he would not receive any benefit from the AFDC grant, the entire amount of which the family is entitled to without him; he is rather a recipient of that charity which the family wishes to extend *from its own resources*." *Taylor v. Lavine*, 497 F.2d 1208, 1221 (2d Cir. 1974). (Oakes, J., dissenting). (A.180). (emphasis in original).

New York's legitimate interest in preventing its public assistance funds from being expended on behalf of non-eligibles "cannot be accomplished by arbitrary means resulting in unjustified reductions of subsistence to the child." *Hausman v. Department of Institutions and Agencies*, 64 N.J. 203, 314 A.2d 362, 366, *cert. denied*, 94 S. Ct. 3083 (1974). See *King v. Smith*, 392 U.S. 309, 334 (1968).

A reduction in the family's grant solely because the parent choses to allow a "lodger" to reside with the family is inconsistent with the "money payment principle." AFDC assistance is statutorily guaranteed to

[42]Taylor v. Lavine, 497 F.2d 1208, 1222 (2d Cir. 1974) (Oakes, J., dissenting). (A.182)

be in the form of money payments. 42 U.S.C. § 606(b). Under the money payment principle payments must be made "with no restriction imposed by the agency on the use of funds by the individual." 45 C.F.R. § 234.11(a); HEW Handbook of Public Assistance, Part IV §§ 5120, 5132, 5141.[43] This principle is a recognition that public assistance "comes to needy persons as a right." HEW Handbook of Public Assistance, Part IV, § 5120; *Goldberg v. Kelly*, 397 U.S. 254 (1970). The recipient has the right "to decide what use of his assistance check will best serve his interest . . . enjoying the same rights and discharging the same responsibilities as do friends, neighbors, and other members of the community. . . . [A] recipient . . . does not, because he is in need, lose his capacity to select how, when and whether each of his needs is to be met." Handbook of Public Assistance, Part IV, § 5120.[44] Thus, under the money payment principle, the recipient family has the right to allow a relative or

[43]See also, HEW, The Role of Public Welfare in Housing, Report to House Committee on Ways and Means and Senate Finance Committee, p. 174 (1969); Money Payments to Recipients of Old Age Assistance, Aid to Dependent Children and Aid to the Blind, Bureau Circular No. 17, Bureau of Public Assistance (1944); Engleman v. Amos, 404 U.S. 23 (1971); 18 N.Y.C.R.R. §§381.1, 381.2. Exceptions to the money payment principle are permissible where the recipient has "demonstrated such an inability to manage funds that payments to the relative have not been or are not currently used in the best interest of the child," in which case "restricted payments" may be authorized. 45 C.F.R. §234.60(a)(2); 18 N.Y.C.R.R. §381.3.

[44]Former Secretary of HEW, Abraham Ribicoff, has stated that deviations from the money payment principle "are humiliating [and] increase dependence instead of encourage independence. . . ." Hearings on H.R. 10606, 87th Cong. 2d. Sess., p. 138 (1962).

friend to reside with them, for example, "out of familial kindness and generosi[illegible]. . . ." *Hurley v. Van Lare*, 380 F.Supp. 167, 174 (S.D. and E.D.N.Y. 1974). (A.650).

A reduction in the family's grant solely because the caretaker relative chooses to allow a friend or relative to reside with them violates the meaning and purpose of the money payment principle. The family is penalized for choosing to allow a non-legally responsible person to reside with them in "their own home. . . ." 42 U.S.C. §§ 601, 606(a).[45]

Plaintiffs agree with defendants that the only persons entitled to AFDC assistance are children and caretaker relatives who meet the eligibility requirements of need and dependency, and "essential persons" residing with such eligible individuals. It may be possible for the "lodger" to qualify as an "essential person", 42 U.S.C. §§ 602(a)(7), 606(b)(1), but only the recipient can choose to regard a person as an essential person. *Solman v. Shapiro*, 300 F.Supp. 409, 415 (D. Conn.) (three-judge court), *aff'd per curiam*, 396 U.S. 5 (1969); 45 C.F.R. § 233.20(a)(2)(vi)(b). The effect of the designation of a person as an essential person is that the state must consider that person's needs in computing the recipient family's grant. "The effect of the rule . . . enlarges the eligible individual's budget to comprehend the needs of

[45]The state has a wide array of remedies if funds are being diverted or otherwise not being spent in the child's best interest. See statutes and regulations cited in Taylor v. Lavine, 497 F.2d 1208, 1221 n. 13 (2d Cir. 1974) (Oakes, J., dissenting). (A.180-181). See also Social Security Amendments of 1974, Pub.L. No. 93-647, §§2001-2002; 42 U.S.C. §605; *New York Social Services Law*, §131-a(7), (direct payments to landlord authorized if recipient fails to fully apply amount allowed for shelter for that purpose); 143-b; 143-c; 145; 350-a. See generally, Wyman v. James, 400 U.S. 309, 319 (1971).

the 'essential person' as well as his own." *Solman v. Shapiro, supra* at 415. There is nothing in the federal statute or in its legislative history which indicates that if a person is not designated as an essential person the state can reduce the family's grant because of this person's presence in the home. Cf. *Lopez v. Vowell*, 471 F.2d 690, 694 (5th Cir.), aff'd 411 U.S. 933 (1973); *Lund v. Affleck*, 43 U.S.L.W. 2324 (D.R.I. 1975).[46]

The fact that a "lodger receives benefits and comforts from residing in the public assistance household was not an acceptable basis for terminating or reducing the families' assistance in *King* and *Lewis*,[47] because a reduction on this basis conflicts with the "paramount goal" of protecting and aiding needy and dependent children.[48] Section 233.90(a) specifically prohibits the

[46]In addition, a reduction in the grant pursuant to the challenged regulations operates to penalize the family for not designating the "lodger" an essential person, thereby impinging on their choice of designation under 45 C.F.R. §233.20 (a)(2)(vi)(b).

[47]The man assuming the role of spouse was "in or around the home." Lewis v. Stark, 312 F.Supp. 197, 203 (N.D. Calif. 1968) (three-judge court), rev'd sub nom., Lewis v. Martin, 397 U.S. 552 (1970).

[48]A stepfather residing in the home also receives these benefits and comforts, but the courts, on the basis of 45 C.F.R. §233.90(a), have consistently held that the state cannot assume that his income is available to an AFDC family unless his obligation of support is equal to that of a natural parent. Solman v. Shapiro, 300 F.Supp. 409 (D. Conn.) (three-judge court), aff'd per curiam, 396 U.S. 5 (1969). Accord, Rosen v. Hursh, 464 F.2d 731 (8th Cir. 1972); Gaither v. Sterrett, 346 F.Supp. 1095 (N.D. Ind.) (three-judge court), aff'd, 409 U.S. 1070 (1972); X.v. McCorkle, 333 F.Supp. 1109, 1118 (D.N.J. 1970), aff'd sub nom. Engleman v. Amos, 404 U.S. 23 (1971); Ojeda v. Hackney, 319 F.Supp. 149 (N.D. Tex. 1970); Uhrovick v. Lavine, 43 App.Div.2d 481 (3d Dept.), aff'd, _N.Y.2d_ (1974); Bunting v. Juras, 502 P.2d 607 (Ore. Ct. App. 1972).

states from assuming the availability of income of a non-legally responsible person because of this person's "inclusion in the family, or . . . presence in the home. . . ." New York thus may not reduce the AFDC grant because the "lodger'. derives benefits and comforts from residing with the AFDC family.

In *King v. Smith*, 392 U.S. 309 (1968), this Court recognized that the State has legitimate interests in dealing with immorality, illegitimacy and "in economically allocating its limited AFDC resources. . . ." *King v. Smith, supra*, at 320, 334. The Court stressed, however, that the State may not carry out these interests by denying AFDC assistance designed to meet the needs of needy and dependent children because a non-legally responsible person resides in the home. The Social Security Act and its implementing regulations forbid New York from denying assistance to its needy and dependent children solely because a parent allows a non-legally responsible person to reside in the home. *King v. Smith, supra; Lewis v. Martin*, 397 U.S. 552 (1970).

II.

THE PRO-RATA REDUCTION OF THE SHELTER ALLOWANCE OF A FAMILY RECEIVING PUBLIC ASSISTANCE BECAUSE A NON-LEGALLY RESPONSIBLE PERSON RESIDES WITH THE PUBLIC ASSISTANCE FAMILY CONSTITUTES A CONCLUSIVE PRESUMPTION IN VIOLATION OF THE DUE PROCESS CLAUSE THAT THIS PERSON IS ABLE TO AND DOES PAY PART OF THE FAMILY'S RENTAL EXPENSE.

This Court has held that the Due Process Clause prohibits a state from enacting a statutory or regulatory provision that creates "a presumption which operates to deny a fair opportunity to rebut it. . . ." *Heiner v. Donnan*, 285 U.S. 312, 329 (1932). Accord, *Carrington v. Rash*, 380 U.S. 89 (1965); *Schlesinger v. Wisconsin*, 270 U.S. 230 (1926).

In several recent cases, this Court has held that where important interests are at stake, the state may not conclusively presume facts that are "not necessarily nor universally true in fact", *Vlandis v. Kline*, 412 U.S. 441, 452 (1973), but must provide the private party with a meaningful opportunity to show the actual facts. *Cleveland Board of Education v. La Fleur*, 414 U.S. 632, 94 S.Ct. 791, 798-801 (1974) (public employment); *United States Department of Agriculture v. Murry*, 413 U.S. 508, (1973) (food stamps); *Vlandis v. Kline, supra*, (college tuition benefits); *Stanley v. Illinois*, 405 U.S. 645 (1972) (child custody); *Bell v. Burson*, 402 U.S. 535 (1971) (driver's license). "Statutes creating permanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments." *Cleveland Board of Education v. La Fleur*, 94 S.Ct. *supra* at 798, quoting from *Vlandis v. Kline, supra* at 446.

An analysis of these cases reveals that a conclusive presumption of fact violates the Due Process Clause when (a) the presumption adversely affects an interest protected by the Due Process Clause, (b) the legislative scheme purports to be concerned with the subject matter of the presumed fact, (c) the fact presumed is "not necessarily or universally true in fact", and (d) "the State has reasonable alternative means of making

the crucial determination." *Vlandis v. Kline*, 412 U.S. 441, 452 (1973). Each of these elements is clearly present in the instant case.

The interest at stake, public assistance, is "property" within the meaning of the Due Process Clause in the form a "statutory entitlement" that represents the very means to subsist. *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970). More specifically," [i]n this case the 'property' right in question is the AFDC recipient's statutory entitlement to a shelter allowance commensurate with actual need." *Hurley v. Van Lare*, 380 F.Supp. 167, 175 (S.D. and E.D.N.Y. 1974). (A.652). See 18 N.Y.C.R.R. §352.3(a). The reduction of the family's shelter allowance constitutes a taking of this property interest. This taking is even more apparent and substantial than the takings in *Murry* and *Vlandis*, which involved the denial of *applications* for food stamps and lower tuition benefits. See *Morrisey v. Brewer*, 408 U.S. 471, 482 n. 8 (1972), distinguishing for due process purposes between parole revocation and the denial of parole release.

In each of this Court's recent conclusive presumption cases, the State denied the private party an opportunity to show the actual facts dealing with a subject "the State purported to be concerned with. . . ." *Vlandis v. Kline*, 412 U.S. 441, 446-447 (1973).[49] In *Bell v. Burson*, 402 U.S. 535, 541 (1971), this Court looked "to the operation of the State's statutory scheme" and found that the conclusively presumed fact played a "crucial role" in that scheme.

[49] In *LaFleur* and *Stanley*, the state purported to be concerned with fitness, in *Murry* with need, in *Vlandis* with residency, and in *Bell* with fault. See Bell v. Burson, 402 U.S. 535, 541 (1971), *Vlandis v. Kline, supra* at 446-447. United States Department of Agriculture v. Murry, 413 U.S. 508, 516 (1973) (Stewart, J., concurring).

New York, in carrying out its public assistance program, purports to be concerned with meeting the needs of its indigents. *N.Y. Constitution*, Art. XVII, § 1; *New York Social Services Law* §§131(1), 131-a(1); 18 N.Y.C.R.R. Parts 351 and 352. Indeed, New York purports to meet 100% of its recipients' needs, *N.Y. Social Services Law* § 131-a(1); 18 N.Y.C.R.R. §§ 352.1, 352.2, including their rental obligations and full shelter needs, 18 N.Y.C.R.R. § 352.3. Regular recurring grants are intended to meet the full budget deficit. 18 N.Y.C.R.R. § 352.29.

Fundamental to New York's public assistance scheme in determining a family's eligibility and the amount of assistance to which they are entitled is New York's purported concern with the needs, income and resources of *each* recipient. It investigates in depth the family's actual resources and income. 18 N.Y.C.R.R. §§ 351.2(e), 352.11, 352.12, 352.15, 352.16, 352.17, 352.23, 352.27, 352.28. See generally, *Taylor v. Lavine*, 497 F.2d 1208, 1220 n.11 (2d Cir. 1974) (Oakes, J., dissenting). (A.178-179). In addition, the State is concerned with the resources, income and contributions made by a public assistance family's non-legally responsible friends and relatives. 18 N.Y.C.R.R. §§ 351.2(d)(1), 352.14, 352.31(a)(3)(i)(ii), 369.2(b). The specific challenged regulations themselves are concerned with and purport to constitute an application of the lodger's "available income and resources", 18 N.Y.C.R.R. § 352.31(a)(3), and reflect defendants' "judgment . . . that, in general, lodgers residing with AFDC recipients should pay their pro-rata share of the housing cost. . . ." Brief for Appellants Lavine and Van

Lare, in the United States Court of Appeals for The Second Circuit, dated December 4, 1973, p. 35.[50]

While defendants purport to be concerned with each public assistance family's need, resources and income, and with the lodger's income, resources and payments to the public assistance family, defendants reduce the grant solely because the so-called "lodger" resides in the home, without any consideration of the above factors, and thus without making a determination that the family's shelter needs have in fact decreased.

A person's presence in the home can only diminish a family's shelter needs if (a) this person makes a financial contribution to the family, or (b) this person's presence substantiates the fact that the public assistance family has more space than it needs for its shelter needs. The grant is reduced, however, without a determination of (a) whether or not the "lodger" contributes his share of the rent, or is even able to, (b) whether or not the "lodger's" presence in the home results in an increase in the family's rental expense, and (c) whether or not his or her presence means that the public assistance family has excess space.[51]

[50] See discussion *supra* at pp. 43-44.

[51] In determining whether a statute creates a conclusive presumption, this Court looks to the "actual operation" of the statute to determine whether "the . . . statute enacts what in effect are non-rebuttable presumpsions. . . ." Shapiro v. Thompson, 394 U.S. 618, 631 (1969). The hearing officer at plaintiff Hurley's fair hearing explicitly found that "the man residing with appellant [Mrs. Hurley] was not willing to assume responsibility for the appellant or her children of which he is not the acknowledged or adjudicated father. In addition, no contribution is made by the lodger to the appellant." Hurley v. Van Lare, 365 F.Supp., *supra* at 194. (A.83).

It is thus clear that the challenged regulations on their face and in operation conclusively presume that (1) the lodger has "available income and resources' and (2) he has "applied' them toward the family's shelter expense. 18 N.Y.C.R.R. §352.31(a)(3); *Hurley v. Van Lare*, 380 F.Supp. 167, 178 (S. and E.D.N.Y. 1974) (three-judge court) (A.658) (Judge Hays, dissenting) ("[I]t is thus clear that the New York regulation 'presumes' that a lodger has the will and means to contribute his or her fair share toward housing expenses. . . ."). This double conclusive presumption is "often contrary to fact", *United States Department of Agriculture v. Murry*, 413 U.S. 508, 514 (1973), and violates the Due Process Clause. See *Mothers and Children Rights Organization v. Stanton*, 371 F.Supp. 298 (N.D. Ind. 1973); *Owens v. Parham*, 350 F.Supp. 598, 605 (N.D. Ga. 1972) (three-judge court); *Boucher v. Minter*, 349 F.Supp. 1240, 1244 (D. Mass. 1972) (three-judge court); *Jenkins v. Georges*, 312 F.Supp. 289, 292 (W.D. Pa. 1969) (three-judge court). Cf. *Hoeper v. Tax Commission*, 284 U.S. 206, 215 (1931), where the Court held that a state's imposition of a tax on a husband for his wife's income violated the Due Process Clause because "[t]hat which is not in fact the taxpayer's income cannot be made such by calling it income."

Even if the challenged regulations are viewed as "based on the fair inference from the presence of the lodger in the household that the AFDC–recipient family actually needs less space than it is paying rent for", *Taylor v. Lavine*, 497 F.2d 1208, 1215 (2d Cir. 1974) (A.168), the challenged regulations conclusively

presume, in every case, that the family has excess space.[52]

Under the regulations, defendants reduce the grant without determining what the family's living accommodations are, whether the family has excess space or too little space, and no matter how high or how low the family's rental expense is. The fact patterns of the named parties substantiate that these factors are given no consideration either at state fair hearings or at the local level when the challenged regulations are applied. In sum, what living space the family in fact has, and whether it has excess apce, are irrelevant factors under the challenged regulations.

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[52]Defendants have disclaimed any reliance on the claim that the challenged regulations are related to the amount of the family's space. Jurisdictional Statement, p. 23 fn. In any event, plaintiffs have shown that it is extremely unlikely that public assistance families have excess space or that the regulations are based on this premise. See discussion *supra*, at 50-51. Cases of "doubling-up" and overcrowding have been documented in numerous New York welfare cases. Watts v. Lavine, 75 Misc. 2d 80, 347 N.Y. Supp. 2d 279 (N.Y. Sup. Ct. 1973) (six persons in two bedroom apartment); Jones v. Kurtis, 65 Misc. 2d 856, 319 N.Y. Supp. 2d 557 (N.Y. Sup. Ct. 1971), aff'd, 37 App.Div. 2d 696, 323 N.Y. Supp.2d 671 (2d Dept. 1971); (13 persons in four room apartment). See also Holmes v. Wyman, 40 App.Div.2d 50, 337 N.Y. Supp. 470 (1st Dept. 1972); Davis v. Lavine, 76 Misc. 2d 984, 352 N.Y. Supp. 2d 545 (N.Y. Sup.Ct. 1972) (five persons in two and one half room apartment); Woods v. Lavine, 76 Misc.2d 677, 351 N.Y. Supp. 2d 309 (N.Y. Sup.Ct. 1973) (eight persons in three room apartment); Nicholson v. Schreck, 75 Misc.2d 676, 348 N.Y. Supp.2d 653 (N.Y. Sup.Ct. 1973) (eight persons in two bedroom apartment with two beds); Baumes v. Lavine, 74 Misc.2d 1046, 347 N.Y. Supp.2d 355 (N.Y. Sup.Ct. 1973), rev'd, 44 App.Div.2d 336, 355 N.Y. Supp.2d 477 (3d Dept. 1974) (one child sleeping on floor, another sharing bed with mother).

Whether the "lodger" regulations are based on a presumption of contribution or of excess space, the State is conclusively presuming that the AFDC family's shelter needs have decreased because of the "lodger's" presence. However, neither a conclusive presumption of available income and income contribution nor a conclusive presumption of excess space is "necessarily nor universally true in fact. . . ." *Vlandis v. Kline*, 412 U.S. 441, 452 (1973); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 94 S.Ct. 791, 799 (1974).

There is no basis to assume that in all cases the "lodger" has available income and is applying all or part of it to the family's rental expense. Congress, HEW and this Court have determined that there is no basis for this assumption. 42 U.S.C. §602(a)(7); 45 C.F.R. §233.90(a), *Lewis v. Martin*, 397 U.S. 552 (1970); *King v. Smith*, 392 U.S. 309 (1968). See also *Boucher v. Minter*, 349 F.Supp. 1240, 1244 (D. Mass. 1972) (three-judge court). In the case of every one of the named parties and proposed intervenors, no contribution was made to the public assistance family. The indication in most of these cases was that the "lodger" did not have any available income and resources to make such a contribution. (A.314).

Similarly, there is no basis to assume that in all cases in which a "lodger" resides in a public assistance family's home that the AFDC family has more space than necessary to meet its shelter needs. The evidence concerning the housing accommodations that welfare recipients reside in is to the contrary. See discussion *supra* at 50-51. In addition, such a presumption "may well be contrary to fact: the older brother may be sharing a single bed with a younger one; the disabled sister may be sleeping on the couch." *Taylor v. Lavine*,

497 F.2d 1208, 1219 (2d Cir. 1974) (Oakes, J., dissenting) (A.177).[53]

In *United States Department of Agriculture v. Murry*, 413 U.S. 508 (1973), this Court held that a provision of the Food Stamp Act, declaring ineligible all households containing a member who was 18 years old or older and who had been claimed as a tax dependent, created an unconstitutional conclusive presumption that all persons in these households were not needy. As in *Murry*, New York in the instant case is conclusively presuming that the needs of all members of the AFDC household have decreased solely because of the presence of a particular person in the home.

Even where it is very likely that a presumed fact will follow from a given fact, a conclusive presumption of fact violates the Due Process Clause because it deprives the party of an opportunity to show what the actual facts are in the specific case. In *Stanley v. Illinois*, 405 U.S. 645, 654-655 (1972), the Court stated:

> "It may be, as the State insists, that most unmarried fathers are unsuitable and neglectful parents. It may also be that Stanley is such a parent and that his children should be placed in other hands. But all unmarried fathers are not in this category; some are wholly suited to have custody of their children. . . . Given the opportunity to make his case, Stanley may have been seen to be deserving of custody of his offspring."

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[53] In an analogous context, Justice Douglas referred to "desperately poor people with acute problems who, though unrelated, come together for mutual help and assistance . . . , the poorest of the poor [who double up] against the adversities of poverty." United States Department of Agriculture v. Moreno, 413 U.S. 528, 542 (1973) (Douglas, J., concurring).

Accord, *Vlandis v. Kline*, 412 U.S. 441, 447-448 (1973); *Carrington v. Rash*, 380 U.S. 89, 95 (1965).

The State has a "reasonable and practicable means of establishing the pertinent facts on which the State's objective is premised." *Vlandis v. Kline*, 412 U.S. 441, 451-452 (1973). Defendants can serve their objectives by making individualized determinations of income contribution, adequacy of housing space and shelter needs.[54] As the court below held, "the state must make an individualized determination of whether the presence of the lodger does *in fact* diminish the family's shelter needs." *Hurley v. Van Lare*, 380 F.Supp. 167, 175 (S. and E.D.N.Y. 1974) (three-judge court). (A.653).

These questions can be determined at State "fair hearings", which defendants make available in all cases in which the recipient seeks to challenge adverse agency action, including reductions in the grant. 18 N.Y.C.R.R. Part 358. These hearings are provided pursuant to this Court's decision in *Goldberg v. Kelly*, 397 U.S. 254 (1970).

There is nothing unusual or difficult in requiring defendants to make these determinations. See *Dunn v. Blumstein*, 405 U.S. 330, 349-352 (1972). They are factual issues that are appropriate for determination at an administrative hearing. They are the type of factual issues that HEW, 45 C.F.R. §233.90(a), and this Court, *Lewis v. Martin*, 397 U.S. 552 (1970), *Shea v. Vialpando*, 416 U.S. 251 (1974), have determined must

[54]These are the only relevant factors to be considered pursuant to 42 U.S.C. §602(a)(7) and 45 C.F.R. §233.90. The other factors suggested by the majority of the three-judge court, 380 F.Supp. at 170, and the lodger's "means or intent", suggested by the dissent, 380 F.Supp. at 178, are all irrelevant in determining the propriety of a reduction in the grant.

be decided on an individualized basis.[55] The issue of contribution can be resolved by objective evidence which the State can obtain through existing programs of periodic investigation and verification. 18 N.Y.C.R.R. Part 351. Even where the factual issues present difficult problems of proof, this Court has held that an individualized determination must be made to protect the private party's interest. *Carrington v. Rash*, 380 U.S. 89, 96 (1965). See also *Cleveland Board of Education v. La Fleur*, 414 U.S. 632 (1974) (medical fitness); *Vlandis v. Kline*, 412 U.S. 441 (1973) (bona fide residence).

Defendants claim that the presumption can be rebutted if the "lodger" applies for public assistance. However, this does not afford the public assistance recipient, the person against whom the challenged regulations and conclusive presumption operate, an opportunity to rebut the presumption. In every one of this Court's conclusive presumption cases, it was the person who was faced with the deprivation of a protected interest because of the operation of a presumption who was entitled to an opportunity to rebut the presumption.

The public assistance family cannot, of course, compel the lodger to apply for assistance. The evidence substantiates that there are complex reasons why as many as half the persons who are eligible for assistance do not apply for it. (A.287, 298-299); R. O'Neil, The Price of Dependency 253-254 (1970); F. Piven and R. Cloward, Regulating The Poor 165 (Vintage ed. 1972).

[55]The fact that the State makes a hearing available does not cure the due process violation where the State precludes consideration of all relevant issues at the hearing. Bell v. Burson, 402 U.S. 535, 542 (1971).

By reducing the public assistance family's grant solely because a non-legally responsible person resides in the public assistance household, defendants are "using a criterion wholly unrelated to" their objectives of providing a shelter allowance commensurate with the public assistance family's actual shelter obligation and shelter needs, 18 N.Y.C.R.R. § 352.3, and with meeting 100% of the needs of its recipients. *Vlandis v. Kline*, 412 U.S. 441, 449 (1973). Defendants have reduced plaintiffs' shelter allowances despite the fact that their income, resources and shelter needs have remained the same. *Mothers and Children's Rights Organization v. Stanton*, 371 F.Supp. 298, 304 (N.D. Ind. 1973). Thus, as in *United States Department of Agriculture v. Murry*, 413 U.S. 508, 514 (1973), the reduction in the grant "is not a rational measure of need" and, as in *Vlandis v. Kline*, 412 U.S. 441, 449 (1973), "ensures that certain of its bona fide residents . . . do not receive their full subsidy. . . ." A reduction in a family's grant when their needs remain unchanged impedes rather than advances the State's legitimate interests. See *Goss v. Lopez*, 43 U.S.L.W. 4181, 4185 (U.S. Jan. 22, 1975); *Stanley v. Illinois*, 405 U.S. 645, 652 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 265-266 (1970).

While "[p]rocedure by presumption is always cheaper and easier than individualized determination," "the Constitution recognizes higher values than speed

and efficiency." *Stanley v. Illinois*, 405 U.S. 645, 656-657 (1972). This Court has consistently held that the administrative burden of making individual determinations does not justify the use of conclusive presumptions. *Cleveland Board of Education v. La Fleur*, 414 U.S. 632 (1974); *Vlandis v. Kline*, 412 U.S. 441, 451 (1973); *United States Department of Agriculture v. Murry*, 413 U.S. 508 (1973); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Reed v. Reed*, 404 U.S. 71, 76 (1971); *Bell v. Burson*, 401 U.S. 535 (1971). See also, *Goldberg v. Kelly*, 397 U.S. 254, 261, 265-266 (1970).

This Court has held that the state may not conclusively presume unfitness to teach from the fact of pregnancy [*La Fleur*], lack of need for food stamps from tax dependence status [*Murry*], non-residency because of recent arrival [*Vlandis*], parental unfitness because the parent claiming custody is an unwed male [*Stanley*], or unfitness to drive because of involvement in an automobile accident. [*Bell*]. Similarly, New York violates the Due Process Clause by conclusively presuming, solely from a "lodger's" presence, either that the "lodger" is paying his share of the rent or that the family has excess space.

POINT III

A REDUCTION IN A FAMILY'S PUBLIC ASSISTANCE GRANT SOLELY BECAUSE A PARENT ALLOWS A NON-LEGALLY RESPONSIBLE PERSON TO RESIDE IN THE HOME INFRINGES UPON THE RIGHTS OF PRIVACY AND ASSOCIATION AND VIOLATES THE EQUAL PROTECTION CLAUSE.

The challenged regulations create two classes of equally needy public assistance recipients. One class consists of those persons who live in households all of whose members are recipients of public assistance. Persons within this class receive a full sheleter grant under New York's welfare program. 18 N.Y.C.R.R. § 352.3(a). The second class is composed of public assistance recipients who live in households which contain a non-legally responsible friend or relative who is not a recipient of public assistance. The regulations cause a substantial reduction in the shelter allowance of individuals falling within the latter class solely because of the presence of this "lodger" in the household.

Plaintiffs contend that the "lodger" regulations infringe upon their constitutionally guaranteed rights of privacy and association, and that, because the state has not met the burden of demonstrating a compelling governmental interest to justify the infringement of these constitutionally protected rights, the regulations violate the Equal Protection Clause of the Fourteenth Amendment. See, e.g., *Dunn v. Blumstein*, 405 U.S. 330, 340 (1972); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963). Plaintiffs submit further that even assuming

that the "compelling interest" test is inapplicable, the regulations still fail to pass constitutional muster under the Equal Protection Clause because they do not rationally further any legitimate governmental objective.

A. The "Lodger" Regulations Infringe Upon The Constitutionally Protected Rights Of Privacy And Association By Penalizing Public Assistance Recipients For Inviting A Friend Or Relative Into The Home

It is well-established that the Constitution guarantees certain areas or zones of privacy. *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Stanley v. Georgia*, 394 U.S. 557 (1969); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). The right of privacy has been awarded great importance in our constitutional scheme. As Justice Brandeis stated:

> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfaction of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, their right to be let alone–the most comprehensive of rights and the right most valued by civilized man." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (dissenting opinion).

In *Stanley v Georgia*, 394 U.S. 557, 564 (1969), this Court, citing Justice Brandeis' dissent, held that "fundamental is the right to be free, except in very limited circumstances, from unwarranted governmental intrusions into one's privacy." See also, *Eisenstadt v Baird*, 405 U.S. 438 (1972); *Griswold v Connecticut, supra*. Cf. *NAACP v Alabama*, 357 U.S. 449, 462 (1958).

This Court has repeatedly stated that the very heart of the right of privacy is the right to be free from unwarranted governmental intrusion into one's home. *Stanley v Georgia, supra* at 565. "[O]ver the years, the Court consistently has been most protective of the privacy of the dwelling." *Wyman v James*, 400 U.S. 309, 316 (1971). See also *Eisenstadt v Baird, supra* at 453; *Griswold v Connecticut, supra* at 484; *Boyd v United States*, 116 U.S. 616, 630 (1886).

The right of privacy in the home guarantees individuals the freedom of personal choice in matters of marriage and family life. *Cleveland Board of Education v La Fleur*, 414 U.S. 632, 94 S.Ct. 791, 796 (1974); *Roe v Wade*, 410 U.S. 113, 152-153 (1973); *Eisenstadt v Baird*, 405 U.S. 438 (1972); *Loving v Virginia*, 388 U.S. 1, 12 (1967); *Griswold v Connecticut, supra; Prince v Massachusetts*, 321 U.S. 158, 166 (1944); *Skinner v Oklahoma*, 316 U.S. 535, 541 (1942); *Pierce v Society of Sisters*, 268 U.S. 510 (1925); *Meyer v Nebraska*, 262 U.S. 390 (1923). See generally Note, *On Privacy: Constitutional Protection For Personal Liberty*, 48 N.Y.U.L. Rev. 670, 738-752 (1973). This right protects those who are not married as well as those who are:

> "[I]n Griswold, the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is *the right of the individual, married or single, to be free from unwarranted governmental intrusion* into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt v Baird*, 405 U.S. 438, 453 (1972) (emphasis added)

Closely related to the right of privacy in the home is the freedom to associate guaranteed by the First and Fourteenth Amendments. *Bates v City of Little Rock*, 361 U.S. 516, 523 (1960); *NAACP v Alabama*, 357 U.S. 449, 462 (1958). The freedom to associate includes the right to form not only political bonds, but "social, legal and economic" groups as well. *Griswold v Connecticut*, 381 U.S. 479, 483 (1965); NAACP v. Button, 371 U.S. 415, 430 (1963); *Brotherhood of R R Trainmen v Virginia ex rel Virginia State Bar*, 377 U.S. 1 (1964); *Moreno v United State Department of Agriculture*, 345 F.Supp. 310, 315 (D.D.C. 1972) (three-judge court), *aff'd on other grounds*, 413 U.S. 528 (1973). See also *Belle Terre v Boraas*, 416 U.S. 1, 94 S.Ct. 1536, 1544 (1974) (Marshall, J., dissenting) and cases cited therein; *United States Department of Agriculture v Moreno*, 413 U.S. 528, 541 (1973) (Douglas, J., concurring).

Plaintiffs submit that the intertwined rights of privacy and association encompass the freedom of individuals to invite persons who will satisfy their social, "intellectual and emotional needs" to reside in their homes. See *Stanley v Georgia*, 394 U.S. 557,

564-565 (1969); *Belle Terre v Boraas, supra* at 541, (Marshall, J., dissenting); *United States Department of Agriculture v Moreno, supra* at 790, (Douglas, J., concurring).[56]

This Court has held that the Constitution protects the individual's right to possess and use obscene materials in the home, *Stanley v Georgia, supra,* to be safe in the home from unsolicited convassing, *Breard v Alexandria*, 341 U.S. 622 (1951), to be secure in the home from unwarranted police searches, *Mapp v Ohio*, 367 U.S. 643 (1961), and to use contraceptives in the

[56]The instant case stands much closer to Department of Agriculture v. Moreno, *supra*, than to Belle Terre v. Boraas, *supra*. Like *Moreno*, this case involves a challenge to a scheme of dispensing public benefits which penalizes recipients or potential recipients for choosing to reside with unrelated persons. There is no claim here, unlike in *Belle Terre*, that the occupancy of an unrelated person in a recipient's home violates any zoning ordinance or is in any manner unlawful or that the occupancy could be banned on the rationale that it would advance a legitimate governmental objective.

Moreover, the instant regulation, like the *Moreno* statute, is applicable whenever an individual chooses to live with even a single unrelated person. The *Belle Terre* ordinance, on the other hand, was aimed at individuals who choose to live with more than one unrelated person. By distinguishing *Moreno*, the *Belle Terre* court made it clear that it considered the fact that the ordinance did not prohibit two unrelated persons from residing together as crucial. 94 S. Ct. at 1541 n. 6 ("Moreno is therefore inapt as there a household containing anyone unrelated to the rest was denied food stamps.") The classification in *Belle Terre* was "merely legitimate governmental line-drawing." O'Grady v. North Castle, 43 U.S.L.W. 2345, 2346. (S.D.N.Y. Jan. 10, 1975).

In addition, *Belle Terre* involved a challenge to a zoning ordinance, and this Court has always given great deference to the decisions of local authorities concerning land use, as long as such judgments were "fairly debatable." Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926).

home, *Eisenstadt v Baird*, 405 U.S. 438 (1972); *Giswold v Connecticut*, 381 U.S. 479 (1965). See also *United States Department of Agriculture v Moreno*, 413 U.S. 528 (1973); *id.* at 541 (Douglas, J., concurring); *Moreno v Department of Agriculture*, 345 F.Supp. 310 (D.D.C. 1972) (3-judge court), *aff'd* 413 U.S. 528 (1973). These decisions reflect this Court's view that the right to make decisions concerning "the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing" is a fundamental right that is "implicit in the concept of ordered liberty", and is therefore protected by the Fourteenth Amendment. *Paris Adult Theatre I v Slaton*, 413 U.S. 49, 65 (1973). See *Roe v Wade*, 410 U.S. 113, 152 (1973). A mother's decision to allow a friend or relative to reside in her household for companionship, assistance, security or any other reason falls within the zone of privacy and association in the home recognized by this Court.[57]

The right to invite another person to live in one's household is clearly infringed by the challenged regulations. A family's assistance grant is reduced pursuant to the regulations solely because the family chooses to invite a friend or relative into the home. No matter how small the apartment and no matter how

[57]Wyman v. James, 400 U.S. 309 (1971) is not to the contrary. *James* involved the constitutional validity of New York's policy of requiring a home visit by a caseworker as a condition of eligibility. The policy was upheld because the home visit is at "the heart of welfare administration" and serves important rehabilitative and social functions and policy interests. These factors are not present in the instant case. See Rosen v. Hursh, 464 F.2d 731, 735 (8th Cir. 1971), distinguishing *James*. *Wyman* does not hold or suggest that welfare recipients do not have the right to live with a friend or a relative.

low the rent, the grant will be reduced as long as the family allows the "lodger" to remain in the home. As soon as the "lodger" moves out, the full shelter allowance is restored. *Taylor v Lavine*, 497 F.2d 1208, 1219 n. 8 (2d Cir. 1974) (Oakes, J., dissenting). Since the family's rental allowance is reduced even though the lodger's presence may not diminish the family's shelter needs, it is clear that the AFDC family is suffering a penalty solely because it allows a third party to reside with them.

The regulations force a recipient to choose between, on the one hand, exercising his or her rights of privacy and association and thereby forfeiting a portion of the shelter allowance, and, on the other hand, foregoing these basic rights in order to receive a full grant. By forcing this choice upon public assistance recipients, New York is violating the tenet that a state may not penalize persons, directly or indirectly, for exercising their constitutional rights. *Memorial Hospital v Maricopa County*, 415 U.S. 256 (1973); *Shapiro v Thompson*, 394 U.S. 618 (1969); *Sherbert v Verner*, 374 U.S. 403, 404 (1963). See also, *Turley v Lefkowitz*, 414 U.S. 70 (1973); *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967). Just as a state may not impose a penalty upon the free exercise of religion by denying unemployment insurance benefits to persons who for religious reasons choose not to work on their day of rest, *Sherbert v Verner, supra*, or upon the exercise of the implied constitutional right to travel, in the form of a one year denial of public assistance benefits, *Shapiro v Thompson, supra; Memorial Hospital v Maricopa County, supra*, New York may not reduce a welfare family's grant solely because a parent exercises his or her implicity guaranteed rights of

privacy and association by choosing to invite into the home a friend or a relative.

The penalty imposed upon recipients by enforcement of the regulations is substantial. For example, Mrs. D'Alessio's "lodger" cared for the children during the many occasions that the mother was hospitalized, and, during the periods of the mother's convalescence, ".... took care of her and her children, shopped for food, washed the family's clothes, cooked the family's food, cleaned the house and performed other household tasks." *Hurley v Van Lare*, 380 F.Supp. 167, 171 (S.D. and E.D.N.Y. 1974). The loss of this "lodger" would have caused serious harm to the D'Alessio family. Rather than risk these consequences, Mrs. D'Alessio chose to have her close friend live in her home. As a result of Mrs. D'Allessio's choice, defendants threatened to reduce her family's shelter allowance by $43.60, in spite of the fact that her friend was contributing no financial support to the family, and was unable to make such a contribution. (A.286).[58] The effect of a reduction of $43.60 per month to a family whose total income is $336.00 per month can be staggering. See *Burr v New Rochelle Housing Authority*, 479 F.2d 1165, 1168 (2d Cir. 1973); *Rothstein v Wyman*, 303 F.Supp. 339, 349 (S.D.N.Y. 1969), *vacated and remanded*, 398 U.S. 275 (1970); *Escalera v New York City Housing Authority*, 425 F.2d 853, 864 (2d Cir.), *cert denied*, 400 U.S. 853 (1970).

As one of the plaintiffs' expert witnesses testified before the three-judge court:

[58]Defendants have agreed not to reduce Mrs. D.Alessio's shelter grant pending the outcome of this action. Hurley v. Van Lare, 365 F. Supp. 186, 197 (S.D. N.Y. 1973).

"[A $44 reduction] may make it difficult if one of the children get sick for the family to go to the hospital or to the clinic and you find this quite often that poor people don't have . . . even the thirty-five cents to take them to the clinic or to the welfare office to make an appointment." (A.307).

And, as the lower court concluded in *Hurley v. Van Lare*, 365 F.Supp. 186, 195 (S.D.N.Y. 1973):

"[T]he inevitable result of these regulations is to reduce, perhaps drastically, the stipend for those who are eligible. In the case of a mother with one child, for example, the presence of a non-contributing male lodger would reduce the rental stipend by 33 1/3 percent. This devastating reduction means in practice that rental payments must be met out of the portion of the welfare stipend allotted for food and clothing."[59]

The regulations can cause substantial reductions in a family's grant in a myriad of situations. A reduction can result from the presence in a household of an adult son, as in the Otey[60] and Aloise families, or of a disabled sister, as in the case of the Taylor family, as well as from the presence of a male friend, as in the Clark, Hurley, and D'Alessio households.

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[59]The shelter allowance of proposed-intervenor Aloise and her children was reduced by approximately $53 per month. (A.211-214).

[60]"This is the regulation which requires plaintiff Otey to throw her unemployed 23 year old son out on the street, because if he lives in the home, their shelter allowance will not be sufficient to pay the rent, while if he moves out, the state will pay the full amount." Taylor v. Lavine, 497 F.2d 1208, 1218-1219 (2d Cir. 1974) (Oakes, J., dissenting). (A.175).

If the parent determines that the family cannot subsist with a reduced shelter grant, the parent will be forced to ask the friend or relative to move out of the home, or to refrain from moving in with the family in the first instance. For example, the existence of the regulation has caused plaintiff Hurley to ask one friend to move out of her home, and not to ask another to move in. Defendants concede that but for the pro-ration provisions, Mrs. Hurley would ask a friend to reside with her family. Appellants' Brief, p. 13.[61]

In addition, if the family seeks a contribution from its "lodger", this in itself may cause the lodger to leave the household. One of plaintiffs' expert witnesses, testifying before the three-judge court below, explained that a person "becomes a lodger to serve a variety of functions in the family", that the relationship between men and women is "fragile", and that "if the woman asked him for money, in most cases he doesn't have it, [and] even if he had it, he might say . . . if you put it on that basis, I will just move out. . . ." (A.314).

Enforcement of the challenged regulations thus results in substantial injury to the public assistance family, either by causing a significant reduction in their grant, or by causing them to lose a person who may occupy an important place in the home.

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[61]The regulations thus have the effect of discouraging AFDC mothers from entering into relationships of the type likely to lead to marriage and to end their family dependence upon public assistance. W. Bell, Aid to Dependent Children 99 (1965).

B. The State Has Not Demonstrated A Compelling Interest To Justify Its Infringement Of The Rights Of Privacy And Association

The infringement of plaintiffs' rights of privacy and freedom of association cannot stand unless the state can show both that it is justified by a compelling state interest, see *Roe v. Wade*, 410 U.S. 113, 128 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 447 n. 7 (1972), and that there are no "less restrictive alternatives" of accomplishing the State's purposes. *Cleveland Board of Education v. La Fleur*, 414 U.S. 632, 94 S.Ct. 791-800 (1974); *Shelton v. Tucker*, 364 U.S. 479 (1960). See also *Procunier v. Martinez*, 416 U.S. 396 (1974).

New York has valid interests in ensuring that persons not eligible for public assistance do not receive funds from the State, in determining whether public assistance families receive contributions from their lodgers, 42 U.S.C. §602(a)(7), and in ensuring that public assistance families not reside in overly large quarters. The challenged regulations, however, either fail to further these purposes or do so in an unnecessarily restrictive manner.

The regulations do not prevent the expenditure of funds to persons not eligible for public assistance. The public assistance family's grant is originally computed to meet the statutorily-defined needs of the number of eligible persons in the home. *New York Social Services Law* §131-a; A.526 to A.603. Thus the State expends funds to meet the needs of the recipient unit only. The "lodger" is not the recipient of any funds from the state but is only the beneficiary of the generosity of the public assistance family which allows him to live in their home. *Taylor v. Lavine*, 497 F.2d 1208, 121 (2d

Cir. 1974) (Oakes J., dissenting) (A.179). Moreover, the regulations operate not against the lodger, but against the members of the public assistance family. "[A reduction in] the shelter allowance of an AFDC family by virtue of the presence in the home of a non-paying lodger does not deprive the lodger of any benefits—only the family which allows him to stay can do that—but rather deprives the needy family, and especially the needy child who is the object of the AFDC program, of them." *Taylor v. Lavine*, 497 F.2d 1208, 1222 (2d Cir. 1974) (Oakes, J., dissenting). (A.182). See also *Hurley v. Van Lare*, 365 F.Supp. 186, 195 (S.D.N.Y. 1973). (A.84).

The state's interests in determining whether public assistance families receive contributions from their lodgers or have excess space are also not furthered since grants are reduced pursuant to the challenged regulations whether or not families receive contributions or live in overly large dwellings. These interests can be accomplished by a case by case determination of whether a lodger's presence reduces the shelter needs of a particular family. These determinations can be made at state fair hearings that defendants already make available to all public assistance recipients. 18 N.Y.C.R.R. Part 358. See generally, *Lewis v. Martin*, 397 U.S. 552 (1970); 45 C.F.R. §233.90(a). Individualized determinations of contribution and excess space would not infringe upon plaintiffs' rights of privacy and association, and would carry out defendants' interests.

Plaintiffs agree with the court below that "the constitutionally protected rights of free association and privacy do not compel the states to misallocate their scarce welfare resources" and that the state has an interest in "inquiring whether a lodger's presence in fact

indicates a diminished need for shelter assistance." *Hurley v. Van Lare*, 380 F.Supp. 167, 176 (S.D.N.Y. and E.D.N.Y. 1974). (A.655). However, it is because the state does not *in fact* inquire into whether a lodger's presence reflects a diminished need for shelter assistance that these interests are not furthered. The regulations penalize recipients merely for exercising their right to invite a friend or relative into their household *regardless* of whether or not the lodger's presence reduces the family's needs.

This Court's holding in *Cleveland Board of Education v. Le Fleur*, 414 U.S. 632, 94 S. Ct. 791 791 (1974) is applicable to the instant case. In *Le Fleur*, the Court held unconstitutional across-the-board policies which barred public school teachers from working beyond the fifth and sixth months of their pregnancies on the ground that a conclusive presumption of physical unfitness unduly penalized teachers for exercising their right to bear children protected by the right of privacy. The Court held that where such fundamental rights are affected, the Constitution requires the state "to employ alternative administrative means, which do not so broadly infringe upon basic constitutional liberty" as does a conclusive presumption. *Cleveland Board of Education v. Le Fleur*, 94 S.Ct. at 799-800. The Court viewed the failure of the school boards to make case by case determinations of fitness as constitutionally fatal.

Similarly, since families who invite friends or relatives into their homes are exercising constitutionally guaranteed rights of privacy and association, state policies which infringe upon these rights must be tailored as narrowly as possible. An across-the-board

shelter grant reduction based upon a conclusive presumption of diminished shelter need does not further New York's interests. As in *Le Fleur*, the state's interest can be reasonably carried out by making individualized determinations.

C. The Lodger Regulations Violate The Equal Protection Clause Even Under The Rational Basis Test

Even if no fundemantal constitutional rights were infringed by the challenged regulations, the "lodger" regulations would still violate the Equal Protection Clause because they are not "rationally based and free from invidious discrimination." *Dandridge v. Williams*, 397 U.S. 471, 487 (1970).[62]

Classifications created by state legislation must either be rationally related to the purposes of the legislation or rationally further some other legitimate governmental interest. *Department of Agriculture v. Moreno*, 413 U.S. 528, 533-534 (1973).

The purpose of the AFDC program is to "furnish financial assistance to needy children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the mainte-

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[62]This Court recently made it clear that its decisions in *Dandridge* and Jefferson v. Hackney, 406 U.S. 535 (1972), do not evince an "intention to suspend the operation of the Equal Protection Clause in the field of social welfare. Regulations must still be rationally based and free from invidious discrimination." Hagans v. Lavine, 415 U.S. 528, 94 S.Ct. 1372, 1380 (1974).

nance of continuing parental care and protection." 42 U.S.C. §601. Accord, *N.Y. Social Services Law* §350.[63] To carry out these goals, New York has made a determination to meet 100% of a public assistance family's needs. *N.Y. Social Services Law*' §131-a; 18 N.Y.C.R.R. §352.3(a).

The challenged regulations do not further these articulated purposes. On the contrary, a family's capability for maximum self-support and personal independence, and the well-being of the children are impeded by a reduction in the shelter grant when the family's shelter obligation and needs remain constant.

The mere fact that a third person resides with a needy family in no way reduces the needs of the dependent children and their caretaker relative, when the third person in fact contributes no income, pays no portion of the rent, and is under no legal obligation to support the family. Defendants' argument that the family's needs diminish simply because of the presence of the lodger in the dwelling unit ignores the fact that the public assistance unit remains liable for the entire amount of rent provided for in the rental agreement between the assistance unit and the landlord. As Judge Oakes, dissenting from the decision of the Court of Appeals, noted:

> "[P]laintiff Taylor with her eviction notice would surely laugh, although perhaps a little bitterly, at the majority's suggestion that by housing her destitute and disabled sister the family's 'actual cost of housing' was reduced." *Taylor v. Lavine*, 497 F.2d 1208, 1222 (2d Cir. 1974) (A.183).

[63]New York Social Services Law, §350 (McKinney Supp. 1974) provides that the objective of New York's AFDC program is to "enable the father, mother or other relative to bring up the child properly, having regard for the physical, mental and moral well-being of such child. . . ."

To reduce the grant solely because the family chooses to invite a person into their home, when the family's income expenses and needs remain the same, only serves to harm the children. Such a result is clearly antithetical to the purposes of the federal-state AFDC program. See *Smith v. King*, 277 F.Supp. 31 (M.D. Ala. 1967), *aff'd on other grounds sub nom. King v. Smith*, 392 U.S. 309 (1968).[64] Further, New York's failure to analyze on a case by case basis whether and to what extent a family's needs have been reduced as a result of the presence of a "lodger" in the home bears no relation to the fundamental factor of its statutory scheme of meeting 100% of needy childrens' needs.

The instant case is in this respect analogous to *Stanley v. Illinois*, 405 U.S. 645 (1972), where this Court struck down Illinois' irrebutable presumption that all unwed fathers were unfit parents, noting that "the state registers no gain toward its declared goals when it separates children from the custody of fit parents . . . and that [i]ndeed if Stanley is a fit parent, the state spites its own articulated goals when it needlessly separates him from his family." *Id* at 653. See also, *Goldberg v. Kelly*, 397 U.S. 254, 264-265 (1970); *Carrington v. Rash*, 380 U.S. 89 (1965). In order not to spite its own articulated goal of meeting 100% of the needs of its welfare recipients, New York must

[64]Where the third person is a relative of the family, a reduction in the family's grant solely because of this person's presence in the household also undercuts the purpose of the AFDC program of maintaining and strengthening the family structure, 42 U.S.C. §§(a)(13) and (14)(A)(ii), inasmuch as it has the effect of discouraging the relative from continuing to reside in the household. See Taylor v. Lavine, 497 F.2d at 1219 n. 7 (Oakes J. dissenting). (A.175).

determine on a case by case basis whether the presence of a lodger in a particular household has caused a reduction in the family's shelter needs.

In *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), the Supreme Court held that a federal statute denying food stamps to a household solely because it contained one or more unrelated persons was unrelated to the purposes of the Food Stamp Act and thus violated the Equal Protection principles of the Fifth Amendment. The only difference between the instant case and *Moreno* is that while the challenged regulations cause a reduction of assistance when a friend of non-legally responsible relative moves into a recipient family's household, *Moreno* involved a total denial of food stamps to families containing an unrelated person. The rationale and holding of this Court's decision in *Moreno* are applicable to the case herein. See also *King v. Smith*, 392 U.S. 309, 334 (Douglas, J., concurring); *Smith v. King*, 277 F. Supp. 31 (M.D. Ala. 1967) (three-judge court), *aff'd on other grounds sub nom. King v. Smith*, 392 U.S. 309 (1968); *Williams v. Wohlgemuth*, 366 F. Supp. 541 (W.D. Pa. 1973) (three-judge court), *aff'd*, 94 S. Ct. 1604 (1974).

The regulations not only fail to further the articulated goals of New York's public assistance program but they also bear no rational relationship to any other legitimate governmental objective.

Defendants contend that one purpose of the regulation is to encourage recipients to invite "paying lodgers" into their homes, and to thus decrease the amount of assistance paid by the State. In operation, however, the regulations do not yield this result. If a lodger pays less than $15.00, the family's grant is reduced

by a pro-rata share. 18 N.Y.C.R.R. §352.30(d). If the lodger pays more than $15.00, the grant is reduced by the amount of the payment less a $15.00 disregard. 18 N.Y.C.R.R. §352.30(d). However, regardless of whether the lodger pays the public assistance family $15.00 or an amount in excess of $15.00, the family's total income will not increase by more than the fixed sum of $15.00. Therefore, there is no incentive for the family to seek more than $15.00 from their "lodger". And, where the family does receive only $15.00 from the lodger, because the $15.00 is disregarded, the amount of assistance paid by the state remains the same. See *Hurley v. Van Lare*, 380 F.Supp. 167, 176 (S.D. and E.D.N.Y. 1974) (A.653-654).[65]

In addition, the regulations do not prevent non-eligible persons from benefiting from free living space at the expense of the State since the benefit received by the "lodger" flows not from the state but from the generosity of the recipient family. The grants paid by the state are not increased as a result of the presence of lodgers in the homes of public assistance families. The regulations are not directed against the lodger, who may continue to reside in the family's home after the regulations are applied, but against the public assistance

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[65]Defendants do not suggest that the regulations are designed to ensure against overcrowding in the apartments of New York's needy population. Indeed, such a claim would conflict with its contention that one aim of the regulations is to encourage recipients to take "paying lodgers" into their homes. Brief for Appellants and Respondents at 48.

family, which after reduction of its shelter allowance will have to pay part of its rent out of the portion of its grant designed to meet the family's needs for food, clothing and other non-shelter necessaries.

The severe punishment that is meted out under the challenged regulations is felt most strongly by the children of public assistance families despite the fact that the children generally play no role in the decision to invite the lodger into the household. Visiting harm upon the intended beneficiaries of the Social Security Act solely because of the acts of their parents runs afoul of the "basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing." *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164,175 (1972). See also *Levy v. Louisiana*, 391 U.S. 68, 72 (1968); *St. Ann v. Palisi*, 495 F. 2d 423 (5th Cir. 1974); *Tyson v. New York City Housing Authority*, 369 F. Supp. 513 (S.D. N.Y. 1974).[66]

The needs of a public assistance child bear no relation to the presence of a "lodger" in his household, unless the "lodger" in fact contributes support to the family, or pays a portion of its rent. New York's decision to ignore the constancy of the child's needs and to arbitrarily reduce the family's assistance merely because the parent chooses to allow a friend or relative to reside in the home thus violates the Equal Protection Clause of the Fourteenth Amendment.

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[66]This principle was recognized by Congress when it approved by implication the Fleming Ruling, which provided that a needy child should not be denied aid "because of the behavior of his parent or other relative." See King v. Smith, 392 U.S. 309, 326 (1965); 42 U.S.C. §604(b).

IV.

EVIDENCE OF ALLEGED GIFTS MADE BY THE LODGER TO THE RECIPIENT PRIOR TO THE TIME THE RECIPIENT'S GRANT WAS REDUCED WAS PROPERLY EXCLUDED BY THE THREE-JUDGE COURT BECAUSE THE ISSUE OF CONTRIBUTION HAD BEEN RESOLVED IN PRIOR PROCEEDINGS BETWEEN THE PARTIES AND WAS IRRELEVANT TO THE SUBJECT MATTER OF THE ACTION.

Defendants contend that the three-judge court erred in excluding evidence of alleged gifts made by plaintiff Hurley's "lodger." These gifts were allegedly made prior to the time the "lodger" resided with Mrs. Hurley, and thus prior to the time period during which defendants reduced the family's shelter allowance pursuant to the challenged regulations.

The issue of alleged contribution by Mrs. Hurley's "lodger" had been resolved in proceedings in this action which occurred prior to the hearing before the three-judge court. In his "Decision After Fair Hearing," defendant Acting Commissioner Van Lare found that "no contribution is made by the lodger to the Appellant." (A.37). In their Statement Pursuant to Rule 9(g) of the Civil Rules for the Southern and Eastern Districts of New York submitted in opposition to plaintiffs' motion for summary judgment on both the statutory and constitutional claims, defendants admitted plaintiff Hurley's sworn statement that "[n]o financial support or contributions were made to me or my

children or on our behalf by male friend. . . ." (A.30,33,38,67).[67]

In addition, the proffered evidence was irrelevant to the subject matter of the action. Only relevant evidence is admissible, i.e., "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Federal Rules of Evidence, Pub.L.No. 93-595, §§401-402. A gift made by a "lodger" prior to the time he or she resides with the recipient family is an irrelevant issue under the challenged regulations. The financial condition of the lodger and his ability to pay part of the rent are also irrelevant factors under the challenged regulations. *Hurley v. Van Lare*, 365 F.Supp. 186, 195 (S.D.N.Y. 1973). (A.85). Moreover, there is no federal or state provision which prohibits a third person from making a gift to a public assistance family.

[67]Rule 9(g) provides in relevant part: "The papers opposing a motion for summary judgment shall include a separate, short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried. All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement to be served by the opposing party." Defendants' Rule 9(g) Statement admitted all of the allegations in plaintiff Hurley's affidavit and Rule 9(g) statement, with one minor exception which is not relevant to the instant issue. (A.67-68).

HEW Handbook of Public Assistance, Part IV, §3123.[68]

Finally, a showing by defendants that Mrs. Hurley's "lodger" made a gift or gifts to her does not establish the financial situation of lodgers in general or their propensity to make gifts or other contributions.

In sum, the three-judge court properly rejected defendants' offer of proof because the issue had been determined in prior proceedings, and because it was irrelevant to the subject matter of the action.

V.

PLAINTIFFS TAYLOR AND OTEY'S CLAIMS ARE NOT MOOT BECAUSE THE CHALLENGED REGULATIONS HAVE A CONTINUING IMPACT ON THEM AND THEY FACE THE POSSIBILITY OF FUTURE INJURY.

Defendants claim that plaintiff Taylor's claim became moot because her "lodger", i.e., her disabled sister, became eligible for disability benefits, and that plaintiff Otey's claim became moot because her "lodger", i.e., her unemployed adult son, moved out of her home.

Under the circumstances of this case, the three-judge court found that there was no need to determine if the

[68]The disclosure of the recipient's case record and testimony concerning transactions between the recipient and caseworker would in any event violate the recipient's right of confidentiality protected by New York Social Services Law, §136(2). An exception to the confidentiality protection of section 136(2) is information released "by authority of the county, city or town public welfare official, to a person or agency considered entitled to such information." Defendants, who are state officials, made no attempt to show that release of the information was authorized by the *local* officials specified in section 136(2).

individual claims of plaintiffs Taylor and Otey had become moot. Plaintiffs Taylor and Otey were plaintiffs in the *Taylor* action which was consolidated with the *Hurley* action both in the Court of Appeals and before the three-judge court. Plaintiff Hurley's claim has at all times remained justiciable, Jurisdictional Statement, p. 13, thus enabling her to represent the class of approximately 25,000 recipient-families in the consolidated action. (A.203-204).[69] Because plaintiffs Taylor and Otey could not obtain retroactive welfare benefits, *Edelman v. Jordan*, 415 U.S. 651 (1974), there was no relief unique to them that the district court could grant. After the consolidation of the two actions they became in effect members of the plaintiff class and the only relief they could obtain was the injunctive and declaratory relief which ran to all the members of the class in an identical manner. Fed.R.Civ. P., 23(b) (2). There was thus no need to determine whether plaintiff Taylor and Otey's claims were moot.

In addition, this Court has held that even where the claims of the named plaintiffs have become moot, they can continue to represent the other members of a class which has been certified to be a proper class. *Sosna v. Iowa*, 43 U.S.L.W. 4125 (U.S. Jan. 14, 1975); *Richardson v. Ramirez*, 418 U.S. 24 (1974); *DeFunis v. Odegard*, 416 U.S. 312, 317 (1974) (dictum); *Dunn v. Blumstein*, 405 U.S. 330, 333 n. 2 (1972); *Johnson v.*

[69]The action had been certified as a proper class action by the single judge in the *Hurley* action. (A.99). This determination was not disturbed by the Court of Appeals. The action was recertified as a class action by the three-judge court. (A.662). Motions to intervene as party plaintiffs were made as a precautionary measure to insure that the interests of the class were protected. (A.41,56,205).

New York State Education Department, 409 U.S. 75, 76 fn. 7 (1972) (Marshall, J., concurring); Note, *The Mootness Doctrine In The Supreme Court*, 88 Harv.L. Rev. 373 (1974). All of the elements set forth in *Sosna* are present in this case: (a) the action was certified as a class action, (b) the class is adequately represented and the named plaintiffs and the other members of the class do not have any conflicting interests, Fed.R.Civ.P., 23(a) (3), and (c) the nature of the controversy is such that the factual situation of a named plaintiff is likely to change "during the normal time required for resolution of the controversy. . . ." *Sosna v. Iowa*, *supra* at 4127-4129.

Moreover, plaintiffs Taylor and Otey's claims remained justiciable because the challenged regulations have a continuing adverse impact on the relationship between the recipient family and the "lodger." One of the plaintiffs expert witnesses testified that the enforcement of the challenged regulations may force the "lodger" out of the house. (A.314). This was substantiated in the cases of plaintiffs Hurley and Otey. (A.35,229-230,232). Thus, just as the availability of welfare benefits to strikers had an ongoing effect on the relationship between employer and employee, *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 123-124 (1974), a prior reduction and threatened future reduction in the grant pursuant to the challenged regulations has an ongoing effect on the relationship between the recipient-family and its "lodger". See Note, *The Mootness Doctrine In The Supreme Court*, 88 Harv. L. Rev. 373, 379 (1974).

The very nature of the controversy is such that the situation of the parties is subject to constant change,

often because of the enforcement or threatened enforcement of the challenged regulations. Plaintiff Otey's adult son moved in and out of the family's apartment several times. (A.229). The last time he moved out was apparently because of the enforcement of the challenged regulations. (A.229-230). Plaintiff Taylor's disabled sister was first found eligible, then ineligible, and then again eligible for public assistance within a very brief period of time. (A.226,228). The issue is of a recurring nature and to hold any named party's claim moot would render that claim " 'capable of repetition, yet evading review.' " *Super Tire Engineering Co. v. McCorkle,* 416 U.S. 115, 125-127 (1974); *Roe v. Wade,* 410 U.S. 113, 125 (1973); *Dunn v. Blumstein,* 415 U.S. 330, 333 fn. 2 (1972); *Moore v. Ogilvie,* 394 U.S. 814, 816 (1969); *Southern Pacific Terminal Co. v. I.C.C.,* 219 U.S. 498, 515 (1911).

VI.

THE CLASS WAS PROPERLY DEFINED TO INCLUDE ALL THOSE PERSONS WHOSE PUBLIC ASSISTANCE GRANTS WERE REDUCED OR THREATENED WITH REDUCTION SOLELY BECAUSE OF THE PRESENCE OF A "LODGER" IN THE HOME PURSUANT TO THE CHALLENGED REGULATIONS.

Defendants contend that the class is defined improperly because it includes recipients who reside with paying lodgers.

Plaintiffs agree with defendants "that regular and actual contributions to a needy child . . . can be taken

into account . . ." in computing a family's eligibility and the amount of assistance to which they are entitled. *King v. Smith,* 392 U.S. 309, 319 (1968). The class as defined by the three-judge court, particularly when read together with that court's decision, does not purport to include recipients who reside with lodgers in the plaintiff class who *in fact* contribute at least a pro-rata share of the rent.

The class consists of recipients of public assistance who are receiving or are threatened with receiving a reduced grant of public assistance "*solely* because of the presence of a 'lodger' in the home pursuant to 18 N.Y.C.R.R. §§352.31(a)(3)(IV) and 352.30(d);" (A.662). (emphasis added). The use of the word *solely* makes it clear that defendants are not precluded from reducing the grant to the extent that actual contributions made by the "lodger" diminish the family's shelter expense. The three-judge court made this clear when it stated:

> "Before reducing the shelter allowance of a recipient family because the family houses a *non-contributing lodger,* the state must make an individualized determination of whether the presence of the lodger does *in fact* diminish the family's shelter expense." *Hurley v. Van Lare,* 380 F.Supp. 167, 175 (S.D. and E.D.N.Y. 1974). (A.653). (first emphasis added; second emphasis in original).

The class was thus properly defined to include only those recipients whose grants were reduced solely because a "lodger" resided in the home.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the three-judge district court should be affirmed, and that the judgment of the Court of Appeals should be reversed.

February 25, 1975 Respectfully submitted,

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APPENDIX A

THE PREDECESSORS OF NEW YORK'S LODGER REGULATIONS

18 N.Y.C.R.R. §353.2

353.2 Persons included in the budget. (a) For budgetary purposes the agency shall include in its estimate of need and application of income all persons applying for or receiving public assistance and care and living as a unit within the same household.

(b) A relative in the household who is neither the spouse of the recipient nor the parent of a minor recipient and who is not applying for nor receiving public assistance shall not be included in the budget and shall be presumed to be self-maintaining and paying $90 a month for room and board.

(c) A lodger, boarder or boarding-lodger shall not be included in the budget but shall be presumed to pay $65 a month for room and $55 a month for board on a commercial basis.

Historical Note

Sec. amd., filed Aug. 12, 1964; repealed, new added, filed Dec. 23, 1965; amd., filed Apr. 20, 1967 to be eff. immediately. New subds. (b) and (c) substituted.

166.5 SS 5-31-69

18 N.Y.C.R.R. §353.3

353.3 Estimate of need and application of income. [Additional statutory authority: Social Services Law, § 350]

* * *

(c) *For nonlegally responsible relatives.* (1) When a self-maintaining nonlegally responsible relative is a member of the household and when he is willing to have his income verified and applied, his needs and those of his spouse and minor children shall be estimated in accordance with the MILS established by the department. He should be asked to contribute 50 per cent of the surplus income to the support of the applicant or recipient.

(2) When, however, such relative is unwilling to contribute to the extent indicated above, or is unwilling to have his income verified, and when the applicant or recipient lives in the home of such relative, the agency may meet those needs which the relative is unwilling to meet. Ordinarily only those items which entail additional expense to the relative should be included. However, if essential to the maintenance of the home for the recipient, prorated shelter costs or a board and room rate may be allowed. The boarding rate may include payment for exceptional personal services if they cannot otherwise be provided.

(3) When such relative is unwilling to contribute to the extent indicated in paragraph (1), and when the relative lives in the home of the recipient, the

budget deficit of the recipient shall be reduced by an amount equal to the difference between the prevailing commercial rate for room and board and the cost attributable to his living in the home. The provisions of this paragraph shall apply also to a friend living with a recipient.

* * *

Historical Note

Subd. (a) repealed, new added, filed Dec. 23, 1965 to be eff. Dec. 23, 1965.

Subd. (b) amds. filed: Aug. 12, 1964; Sept. 22, 1964; Apr. 23, 1965; Dec. 23, 1965 to be eff. Dec. 23, 1965. New pars. (5) and (6) substituted.

Subd. (c) amds. filed: Sept. 10, 1965; Dec. 23, 1965 to be eff. Dec. 23, 1965. New pars. (2) and (3) substituted.

Subd. (d) amd., filed Dec. 23, 1965 to be eff. Dec. 23, 1965. New par. (1) substituted.

Subd. (e) amd., filed Aug. 12, 1964 to be eff. Aug. 12, 1964. Inserted "dependent" before "person's needs".

Subd. (e), par. (2) amd., filed Aug. 12, 1964 to be eff. Aug. 12, 1964. Substituted "shall" for "may"; deleted "the circumstances * * * case and" before "the amount".

Subd. (f) amd., filed Dec. 23, 1965 to be eff. Dec. 23, 1965. Deleted "as * * * care" after "practicable".

PART 353

Part (§§ 353.1—353.4) repealed, filed June 2, 1970 eff. June 1, 1970.

* * *

353.2 Amd. filed Aug. 12, 1964; repealed, new filed Dec. 23, 1965; amd. filed Apr. 20, 1967; repealed, new filed June 24, 1969; repealed, filed June 2, 1970 eff. June 1, 1970.

353.3 Amds. filed: Aug. 12, 1964; Apr. 23, 1965; Sept. 10, 1965; Dec. 23, 1965; Apr. 20, 1967; July 28, 1967; May 14, 1969; June 24, 1969; repealed, filed June 2, 1970 eff. June 1, 1970.

* * *

18 N.Y.C.R.R. §352.30 (filed June 2, 1970)

352.30 Persons included in the budget.

* * *

(c) A non-legally responsible relative in the household who is not applying for nor receiving public assistance shall not be included in the budget and shall be deemed to be a lodger or boarding lodger. The amount which the lodger or boarding lodger pays shall be verified and treated as income to the family. For the lodger, the amount in excess of $15 per month shall be considered as income; for such boarding lodgers, the amount in excess of $60 per month shall be considered as income.

Historical Note

Sec. added, filed June 2, 1970 eff. June 1, 1970.

18 N.Y.C.R.R. §352.31(a)(3) (filed June 2, 1970)

352.31 Estimate of need and application of income. (a) *For applicant or recipient.*

* * *

(3) If a female applicant or recipient is continuously cohabiting with a man to whom she is not married, his income or resources shall, if he agrees, be considered in determining the family's eligibility for assistance. If he is not agreeable to such arrangement, his available income and resources shall be applied against his prorated share of the family's shelter needs, against the needs of the minor children of which he is either the acknowledged or adjudicated father and against the needs of the applicant or recipient in consideration of her services as a housekeeper.

* * *

Historical Note

Sec. added, filed June 2, 1970 eff. June 1, 1970.

18 N.Y.C.R.R. §352.30 (As amended September 1, 1970)

352.30 Persons included in the budget.

* * *

(c) A non-legally responsible relative or related person in the household, who is not applying for nor receiving public assistance shall not be included in the budget and shall be deemed to be a lodger or boarding lodger. The amount which the lodger or boarding lodger pays shall be verified and treated as income to the family. For the lodger, the amount in excess of $15 per month shall be considered as income; for such boarding lodgers, the amount in excess of $60 per month shall be considered as income. In the event a lodger does not contribute at least $15 per month, the family's shelter allowance including fuel for heating, shall be a pro rata share of the regular shelter allowance.

Historical Note

Sec. added, filed June 2, 1970; amd. filed Sept. 1, 1970 eff. immediately. Substituted new (c).

18 N.Y.C.R.R. §352.31 (As amended September 1, 1970).

352.31 Estimate of need and application of income. (a) *For applicant or recipient.*

* * *

(3) When a female applicant or recipient is living with a man to whom she is not married, other than on an occasional or transient basis, his available income and resources shall be applied in accordance with the following:

(i) When the man is willing to be considered as a spouse, his available income and resources shall be applied in determining eligibility and degree of need.

(ii) When the man is willing to assume responsibility only for his needs, the needs of the woman and those children for whom he is the acknowledged or adjudicated father, his available income or resources shall be applied in determining eligibility and degree of need of such persons only; and assistance for any remaining children shall be provided on a pro rata basis.

(iii) When the man is willing to assume responsibility only for his needs, and the needs of those children for whom he is the acknowledged or adjudicated father, his available income and resources shall be applied in determining eligibility and degree of need of such persons only; and assistance for the woman and remaining children shall be provided on a pro rata basis.

(iv) When the man is unwilling to assume responsibility for the woman or her children, and there are no children of which he is the acknowledged or adjudicated father, he shall be treated as a lodger in accordance with section 352.30(c).

* * *

Historical Note

Sec. added, filed June 2, 1970 eff. June 1, 1970.

APPENDIX B

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL AND REHABILITATION SERVICE
WASHINGTON, D.C. 20201

ASSISTANCE PAYMENTS ADMINISTRATION

August 7, 1974

Mr. Marvin A. Schwartz
Legal Aid Society of Westchester County
56 Grand Street
White Plains, New York 10601

Dear Mr. Schwartz:

Your letter of July 12, 1974, and a copy of your earlier letter of June 6 on the same subject reached this Branch recently from the APA Public Inquiries section. We regret that such a delay has occurred between your inquiry and a reply. Our portion of the delay resulted from a hope that we would find some one who had done the necessary research or who could now do it. But we were not that lucky.

The New York regulations which you cite have idea counterparts in the policies and State Plan provisions of most States relating to their budgeting procedures. These provisions are usually not directed to "the lodger" specifically but to the presence in the same household of non-needy non-AFDC persons. The common budgeting procedure is to allocate to the AFDC family a proportionate share of the cost of shelter and utilities, as allowed by the State, and a share to the non-needy person or persons living there. This action is in line with the "need" concept in determining the amount of the payment; that is, the AFDC-eligible unit does not, in fact, need the entire shelter in which they are living as evidenced by the fact that part of it is used by an additional person or persons. For the AFDC family group, the cost-of-shelter "need" is met in their budget and assistance payment; and the non-needy persons sharing the shelter are responsible for meeting his or their own portion. The staff members who are most familiar with this area of State Plans and practices have the impression that practically all, if not all, States make such modifications.

As you may know, the New York Regulation 18 NY CRR § 352.30 (d) has not been approved by the Region as a part of the State's AFDC Plan. The Plans of other States which we looked at did not set an amount of assumed payment - as the NY regulation seems to do - but used a graduated chart to show how shelter and utility costs were to be prorated in a "mixed" household.

We hope this information is helpful to you. We are sorry that we do not have the staff to research the State Plans more precisely for the budgeting information and no way of identifying State statutes which may require such budgeting procedures.

Sincerely yours,

Catherine M. Miller

Catherine M. Miller
Acting Chief, State Plan &
Program Characteristics Branch

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL AND REHABILITATION SERVICE
WASHINGTON, D.C. 20201

ASSISTANCE PAYMENTS
ADMINISTRATION

September 10, 1974

Mr. Marvin A. Schwartz
Legal Aid Society of Westchester County
56 Grand Street
White Plains, New York 10601

Dear Mr. Schwartz:

This letter confirms the information which we gave you by telephone on Friday, September 6, 1974. The call was in reply to your letter of August 20, in which you had asked for further information about New York Regulation 18 NYCRR § 352.30 (d).

The response to your first question is as follows: This section was on the page with other sections of the Regulations which were submitted to the Region II Office of the Social & Rehabilitation Service on September 1972 on Submittal No. 72-35. When the material was sent on to the central office to be filed as part of the State's approved plan for AFDC, this section 352.30 (d) was marked as not approved by the Regional Officer.

The response to the second question is that authority for approval of State Plan amendments has been delegated to the Regional Commissioner for the States within his Region; similarly the decision that a provision is "not approvable" is made by the Regional Commissioner, who usually begins negotiations with the State so it may amend or withdraw the questioned provision.

We would suggest, therefore, that you consult the Regional Commissioner for Region II, Mr. Elmer W. Smith, or the Associate Regional Commissioner for Assistance Payments, Miss Florence Aitchison, for information about why this particular section of the Regulations was considered not approvable two years ago and what its present status is. The address of the Region II office is Federal Building, 26 Federal Plaza, New York, N. Y. 10007. We are sending to Miss Aitchison a copy of the previous correspondence and of this letter so that she may be apprised of your questions.

Sincerely yours,

Catherine M. Miller
State Plan & Program Characteristics
Branch, APA

L AND REHABILITATION SERVICE

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
REGION II
26 FEDERAL PLAZA
NEW YORK, NEW YORK 10007

Mr. Martin Schwartz
Legal Aid Society of White Plains
56 Grand Street
White Plains, New York 10601

Dear Mr. Schwartz:

This is in response to your oral request to Miss Aitchison for copies of correspondence between our Regional Office and the New York State Department of Social Services related to chapter 11, Sections 352.30(d) and 352.31(a)(3)(IV) of the New York State Social Service Department Regulation.

We are enclosing a copy of a letter dated September 21, 1972 from Commissioner Smith to Commissioner Lavine which relates to section 352.30(d). As we reviewed our files we found an apparent oversight in that work materials showed section 352.31(a)(3)(IV) as not approved, but this decision was not reflected in the official action on the plan material.

Sincerely yours,

Florence Aitchison
Associate Regional Commissioner
for Assistance Payments

L AND REHABILITATION SERVICE

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
REGION II
26 FEDERAL PLAZA
NEW YORK, NEW YORK 10007

September 21, 1972

Honorable Abe Lavine
Commissioner
New York State Department of Social Services
1450 Western Avenue
Albany, New York 12203

Re: Submittal 72-35
Codes, Rules & Regulations

Dear Commissioner Lavine:

The captioned subject is accepted for incorporation in your State's Plan with the following exceptions.

Regulation 351.2 (vii) providing that refusal of an applicant or recipient of public assistance to institute proceedings to determine paternity of her child constitutes ineligibility for assistance is not in accord with the Federal proposed amendment to Regulation 233.90.

While it is true this proposal will not be effective until published in the Federal Register, the provisions therein are intended to implement affirmative Supreme Court action in three specific cases. Under these circumstances it does not seem prudent to promulgate Regulation 351.2 (vii) at this time as publication of the amendment is expected shortly.

Regulation 352.30 (d) in the last sentence is unclear in providing that "In the event that a lodger does not contribute at least $15 per month the family's shelter allowance including fuel for heating shall be pro rata share of the regular shelter allowance". This statement is subject to interpretation of budgeting $15. a month as lodger income or whatever lesser amount is in fact paid.

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As you know, Federal policy, Part 233 requires that only income actually available may be considered.

We therefore, suggest that Regulation 352.30(d) be clarified to assure compliance with the Federal Regulation.

Sincerely yours,

Elmer W. Smith
Regional Commissioner